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United States Court of Appeals

FOR THE SECOND CIRCUIT

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S APPENDIX

GERALD E. DWYER,
J. EDGAR MCDONALD,
Attorneys for Appellant,
466 Lexington Avenue,
New York 17, N. Y.

UNITED STATES COURT OF APPEALS
FILED
MAY 13 1957
SECOND CIRCUIT

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William J. Hickey,
Direct 10a

United States Court of Appeals

FOR THE SECOND CIRCUIT

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

Statement Under Rule 15(b)

This action was commenced by New Process Gear Corporation by the service of a summons and complaint upon The New York Central Railroad Company on May 5, 1955, and the answer of The New York Central Railroad Company was filed on June 14, 1955.

The action was tried before the Honorable John W. Clancy, without a jury, on December 4, 1956. Judgment was entered in favor of New Process Gear Corporation and against The New York Central Railroad Company on January 15, 1957, for the sum of $6,550.81 with interest at the rate of 4 per cent. Said judgment included counsel fees in the amount of $2,183.60, and costs of the plaintiff were thereafter allowed in the amount of $38.00. Subsequently, the parties hereto stipulated that the said judgment be amended as follows:

Amount of judgment	$ 6,381.94
Interest	2,898.88
Counsel fees	2,183.60
Costs	38.00
Total	$11,502.42

Complaint

(57)

Civil Action

[SAME TITLE]

The plaintiff, by Harry Teichner, Esq., its attorney, complaining of the defendant, respectfully alleges:

FIRST: That at all the times hereinafter mentioned the plaintiff was and now is a corporation duly organized and existing under the laws of the State of Delaware.

SECOND: Upon information and belief, that at all the times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under the laws of the State of New York.

THIRD: That at all the times hereinafter mentioned the defendant was and now is a common carrier by railroad, engaged in the interstate transportation of freight, and as such common carrier is subject to the provisions of the Interstate Commerce Act, and acts amendatory thereof, and supplemental thereto.

FOURTH: That the roads of the defendant run through the Southern District of New York.

FIFTH: That on and between April 9, 1944 and August 21, 1947, inclusive, plaintiff made numerous carload shipments of automobile driving-gear parts, iron or steel, which moved over the lines of the defendant herein from Syracuse, New York, through Suspension Bridge, New York, to Detroit, Michigan, on which plaintiff paid to defendant and bore transportation charges at rates of 37 cents

per hundred pounds on shipments moving prior to July 1, 1946, 41 cents per hundred pounds on shipments moving between July 1, 1946 and December 31, 1946 inclusive, and 46 cents per hundred pounds on shipments moving on and after January 1, 1947, all subject to a minimum weight of 30,000 pounds per carload.

SIXTH: That said rates and charges for such transportation were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and also unlawful in violation of Section 4 of the Interstate Commerce Act.

SEVENTH: That the reasonable and lawful rates and charges for the transportation of said shipments should have been 42 cents per hundred pounds on shipments moving prior to July 1, 1946, 47 cents per hundred pounds on shipments moving between July 1, 1946, and December 31, 1946 inclusive, and 53 cents per hundred pounds on shipments moving on or after January 1, 1947, all subject to a minimum weight of 24,000 pounds per carload.

EIGHTH: That by reason of the foregoing, the plaintiff has been subjected to the payment of rates and charges for transportation, which were when exacted unjust, unreasonable, unlawful and excessive in violation of Section 1 and Section 4 of the Interstate Commerce Act, and plaintiff has been damaged thereby in the sum of $6,550.81 with interest thereon from the respective dates of payment of the charges.

NINTH: That on or about June 8, 1950 plaintiff duly filed a formal complaint with the Interstate Commerce Commission wherein the plaintiff herein was designated as the complainant, and the defendant herein was designated as defendant, alleging the aforesaid violations of the Interstate Commerce Act and praying that plaintiff be awarded reparation for the damage it sustained thereby.

TENTH: That after hearing the said case bearing I. C. C. Docket No. 30599, the Interstate Commerce Commission made its report on August 8, 1951, finding that the charges assailed were unreasonable to the extent that they exceeded those which would have accrued at the rates set forth in paragraph "SEVENTH" hereinabove; and further finding that plaintiff made the shipments, and paid and bore the charges thereon; that plaintiff was damaged thereby, and is entitled to reparation in the amount of the difference between the charges paid and those which would have accrued on the basis therein found reasonable, with interest; and that plaintiff should comply with rule 100 of the General Rules of Practice of the Interstate Commerce Commission. That said report appears in 281 Interstate Commerce Commission Reports 701-704, reference to which report is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action.

ELEVENTH: That thereupon the plaintiff and the defendant filed with the Interstate Commerce Commission an agreed statement with respect to the aforesaid shipments, showing, among other things the dates on which payment of the assailed charges was made, and thereupon the Commission made and entered its order on August 2, 1954, finding that the plaintiff is entitled to an award of reparation from the defendant in the amount of $6,550.81, with interest, and authorizing and directing the defendant to pay to the plaintiff on or before September 16, 1954 the sum of $6,550.81, with interest thereon at the rate of 4 per cent per annum, from the respective dates of payment of the charges assailed, as reparation as aforesaid. That a copy of said order is hereto annexed, marked Exhibit "A", and is made a part of this complaint.

TWELFTH: Upon information and belief that the aforesaid report and order were duly served on the defendant.

THIRTEENTH: That the plaintiff has duly demanded payment of said award of reparation, but the defendant has failed and refused to pay same, or any part thereof.

FOURTEENTH: That prior to the filing of said formal complaint the aforesaid shipments were the subject of an informal complaint alleging unreasonableness under Section 1 of the Interstate Commerce Act, filed with the Interstate Commerce Commission by the plaintiff against the defendant on or about April 9, 1946; that an amendment to said informal complaint alleging a violation of Section 4 of the Interstate Commerce Act was filed with the Interstate Commerce Commission by the plaintiff on or about June 10, 1946; that the defendant having failed to adjust said informal complaint, as amended, the same was closed on or about April 11, 1950.

FIFTEENTH: That this suit is instituted by plaintiff against the defendant under the Interstate Commerce Act and the amendments thereof.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of $6,550.81, together with interest thereon at the rate of 4 per cent per annum, from the respective dates of plaintiff's payment of the said charges until September 16, 1954, and at the rate of 6 per cent per annum thereafter, together with costs, including a reasonable attorney's fee.

/s/ Harry Teichner,
HARRY TEICHNER,
Attorney for Plaintiff,
Office & P. O. Address,
66 Court Street,
Brooklyn 1, New York.

Exhibit A

Order

Interstate Commerce Commission

No. 30599

New Process Gear Corporation

v.

New York Central Railroad Company

In the matter of awarding reparation based on Rule 100 statement filed herein.

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That on August 8, 1951, the Commission, by division 3, entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation and the parties having filed an agreed statement with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainant New Process Gear Corporation is entitled to an award of reparation from defendant named in the following paragraph in the amount of $6,550.81, with interest:

It is therefore ordered, That the defendant, The New York Central Railroad Company be, and it is hereby authorized and directed to pay unto complainant, New Process Gear Corporation, on or before September 16, 1954, the

sum of $6,550.81, with interest thereon at the rate of 4 per-cent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statement, as reparation on account of unreasonable rates charged for the transportation of automobile driving gear parts, in carloads, from Syracuse, N. Y., to Detroit, Mich.

Dated at Washington, D. C., this 2nd day of August, A. D., 1954.

By the Commission, Commissioner Mahaffie.

GEORGE W. LAIRD,
Secretary.

Answer

[SAME TITLE]

Comes now The New York Central Railroad Company, hereinafter called the defendant, and in answer to the complaint in this action says:

I.

It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegation contained in the First paragraph of the complaint.

II.

It denies the allegations contained in the Sixth, Seventh and Eighth paragraphs of the complaint.

Answer.

III.

It admits the allegation in the Fifth paragraph of the complaint, except insofar as it alleges that the shipments referred to therein moved through Suspension Bridge, N. Y.

IV.

Defendant respectfully refers the court to the formal complaint filed with the Interstate Commerce Commission on or about June 8, 1950, for a more full and complete statement of the allegations of that complaint than is contained in the Ninth paragraph of this complaint.

V.

Defendant respectfully refers the court to the report of the Interstate Commerce Commission, decided August 8, 1951, for a more full and complete statement of the findings made therein by that Commision than is contained in the Tenth paragraph of this complaint.

VI.

The defendant admits the allegations in the Eleventh paragraph of this complaint, except that it denies that the plaintiff and the defendant filed "an agreed statement" with respect to the shipments referred to in that allegation.

VII.

Defendant respectfully refers the court to the record before the Interstate Commerce Commission for a more full and complete statement concerning the informal complaint referred to than is contained in the Fourteenth paragraph of this complaint.

Answer.

AS FURTHER SEPARATE AND COMPLETE DEFENSES TO THIS ACTION, DEFENDANT ALLEGES:

VIII.

That the report of the Interstate Commerce Commission referred to in Paragraph V hereof was and is in error as to matters of fact and of law, and that the findings therein were not supported by competent evidence and were contrary to the weight of the evidence.

IX.

That the order of the Interstate Commerce Commission, dated August 2, 1954, based on the findings in the aforesaid report was and is invalid as a matter of law.

X.

That on or about March 2, 1954, the defendant filed with the Interstate Commerce Commission a petition setting forth some of the errors of fact and of law alleged in Paragraph VIII hereof and seeking reconsideration of the report referred to in Paragraph V hereof, which petition was denied by the Interstate Commerce Commission by order dated May 17, 1954.

XI.

That the action of the Interstate Commerce Commission in denying defendant's petition for reconsideration was arbitrary, unreasonable, and unlawful.

WHEREFORE, defendant respectfully prays that this complaint be dismissed.

THE NEW YORK CENTRAL RAILROAD COMPANY

By (sgd.) J. Edgar McDonald
Gerald E. Dwyer,
J. Edgar McDonald
Attorneys for Defendant.

Testimony

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

Before: HON. JAMES W. CLANCY, District Judge.

New York, December 4, 1956,

10:30 o'clock a.m.

APPEARANCES:

HARRY TEICHNER, Esq., Attorney for Plaintiff.

GERALD E. DWYER, Esq., Attorney for Defendant; J. Edgar McDonald, Esq., of Counsel.

• • • • • • •

(19) WILLIAM J. HICKEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. McDonald:

Q. Will you state, please, your business address? A. 466 Lexington Avenue, New York 17, New York.

Q. By whom are you employed? A. The New York Central Railroad Company.

Q. How long have you been employed by the New York Central Railroad Company? A. Twenty-four years.

Q. In what capacity have you been employed by the defendant over that period of time, Mr. Hickey? A. Since 1932, as I said, I have been employed by the railroad in various capacities along the clerk, general clerk line, until the year 1942, since which I have been in official capacities.

In 1942 I was appointed special representative (20) to the vice president of freight traffic for the entire New York Central System.

William J. Hickey—For Defendants—Direct.

In 1946 I was promoted to assistant to the freight traffic management of the New York Central at New York.

In 1949 I was appointed assistant general freight agent, rates and commerce matters, in the general freight office.

In 1951, the title remaining the same, I was promoted to the freight traffic manager's office directly in charge of all commerce matters.

Since that time my titles have been changed to General Commerce Agent in 1955, and at present my title is Manager of the Commerce Bureau.

Q. Mr. Hickey, in order that there may be no doubt about it, would you state briefly what you mean when you speak of commerce matters? A. Well, commerce matters, summing up first and then probably enlarging, involves litigation, whether it be in court cases, before the Interstate Commerce Commission or the Public Service Commission.

My department, myself and my assistant and our staff, investigate all matters pertaining to special docket applications, informal complaints, formal com- (21) plaints; in the case of trucking activities we investigate applications filed with the Interstate Commerce Commission or the State commissions.

It might be better, and just specifically to this case here, the commerce department received the first informal complaint filed with the Commission. It was investigated and declined. The complaint then became a formal complaint, and we investigated it, and this department proceeded with offering evidence in the case and handling it all the way through.

Q. In brief, Mr. Hickey, would it be correct to state that by commerce matters, you refer to the handling of freight traffic, department matters, which involve proceedings before either the Interstate Commerce Commission, State commissions, and in some instances the courts themselves? A. That is correct.

Q. Did you have any traffic experience prior to your employment with the New York Central, Mr. Hickey? A. Yes, sir. I was with all the eastern railroads, known as the Trunk Line Association, a combination of eastern railroads, from 1919 until 1932.

Q. So that your total traffic experience extends from approximately 1919 to date? (22) A. That is correct.

Q. All that time you were engaged in so-called freight traffic work? A. Yes, including publication of tariffs. I was chief of the tariff bureau of the Trunk Line Association when I left in 1932.

Q. Mr. Hickey, the proceeding that we are here concerned with seeks reparation during a period from April 1st, 1944 to August 21, 1947. What was your particular assignment at that time or capacity with the defendant? A. During that period I had two different positions. At the start of the so-called reparation period I was special representative in the office of the vice president of freight traffic of the New York Central System.

Starting in April 1946 I was assistant to the freight traffic manager at New York.

Q. The period in question began during the so-called second World War; that is correct, isn't it? A. That is correct.

Q. What would you say was the situation with respect to the availability of the railroad box car supply at that time?

Mr. Teichner: If your Honor please, I object to that on the ground that it is immaterial, incompetent (23) and irrelevant.

The Court: Overruled.

A. Well, as I have stated, I was appointed special representative in the vice president's office in December, 1942. That was a new position created in that office. And

in the main, I was assigned to special duties, which included the equipment situation.

We had been through a decade of depression; our equipment was not up, and even prior to the United States' entry into the war we found ourselves short; and with the United States going in the war in December 1941 the shortage became extremely acute, whether it be in box cars or gondolas or flat cars.

I soon found out that one of my duties was, as a representative of the traffic department, to act or contact directly those in the transportation department who had the assignment, at least generally known to assign the available equipment. Just prior to being assigned to this position the Interstate Commerce Commission issued Service Order No. 68. They did it in an endeavor to ease the situation so far as the railroad equipment was concerned. This order was far-reaching. It—

> Mr. Teichner: If your Honor please, may I (24) interrupt the witness to state that I object to any testimony that will go into the question of the administrative matter respecting reasonableness of rates. That is a matter that is peculiarly within the jurisdiction solely of the Interstate Commerce Commission.
>
> The Court: I overrule your objection. (To witness) But I wish you would answer the questions that are put to you instead of going into them at great length.
>
> The Witness: Yes, sir.
>
> Mr. Teichner: May I respectfully except, your Honor.

Mr. Hickey, as I understand the statement you have already made, it would be to the effect that in your capacity as special representative of the vice president of the

freight traffic of the defendant, you had personal knowledge by reason of your contacts with shippers of the acute box car shortage that existed at that time? A. Yes, sir, as well as other equipment.

Q. Is there any doubt at all in your mind that the box car shortage at that time was, as you put it, extremely acute? A. It definitely was.

(25) Q. Was that extremely acute box car shortage so important to the national safety, the national defense, that certain government agencies took steps to attempt to alleviate it to some extent? A. Yes.

Q. I think you have already referred to so-called Service Order No. 68. A. That is right.

Q. Do you have with you the tariff or a supplement to the tariff which reproduces that Service Order No. 68? A. Yes, sir. This is the supplement to the tariff which published the commodity rate herein involved.

Mr. McDonald: If the Court please, I would like to offer in evidence at this time Supplement No. 81 to Agent Curlett, Tariff ICC No. A-707, effective February 15, 1942.

If the Court please, that is a supplement to the tariff which published the rates which were applicable on the involved traffic and made a part of the tariff itself the provisions of the Service Order to which witness Hickey has just referred.

Mr. Teichner: Your Honor, I respectfully object to its admission in evidence on the ground that it is incompetent, irrelevant and immaterial. (26) If counsel is trying here to have a new trial on the administrative issues of the unreasonableness, I again say, your Honor, that it is improper, that the Interstate Commerce Commission has sole jurisdiction over the administrative questions with respect to reasonableness.

Now I do not know, your Honor, whether I should continue objecting or whether I will have a standing objection to testimony.

The Court: You had better continue objecting.

Is there any limitation, Mr. McDonald, to the presentation of the case? Can you go outside the evidence submitted to the Commission? Can you go outside the evidence submitted to the Commission when you come here for an enforcement judgment?

Mr. McDonald: Absolutely, your Honor. That is certainly our contention.

The Court: Have you got any cases on it in your brief?

Mr. McDonald: Yes, sir.

The Court: What page?

Mr. McDonald: One of them, your Honor, beginning on page 3, the Hackney Brothers case, a case reported in 85 Federal Supplement, at page 465. And you will notice particularly the discussion on page 5 (27) of the defendant's brief that distinguishes between the nature of the Commission's authority to establish rates for the future when it is acting in a so-called quasi-legislative function and its authority when it is acting under the statute in awarding reparation and is then performing a quasi-judicial function.

The Court: If you go over to the next page, the first paragraph on page 6, you say:

"In actions to enforce reparation orders, the courts have examined the evidence before the Commission."

And down below it says that the duty of the court is to ascertain whether the findings are supported by substantial evidence.

How could I find that the findings of the Interstate Commerce Commission are erroneous when the

evidence that you submit to prove it was not before them?

Mr. McDonald: One of the ways of doing that, if the Court please, is by noting that first of all we attempted—we did submit some evidence of the character that we are here submitting. That was done in a submission relating to 58 shipments. And the Commission dismissed that with a wave of the hand in (28) its decision, saying in effect that 68 shipments were not representative of some 600 on which reparation was sought.

That was, from my personal standpoint, a surprise that I had never before encountered in my experience before the Commission. And we thereupon filed with the Commission a petition for reconsideration that indicated we had made a review of all the shipments made by the complainant from Syracuse to Detroit during the reparation period, a total of some 2,315.

The Court: The statute makes the findings of the Commission prima facie good?

Mr. McDonald: That is correct, your Honor.

The Court: And it is your duty, in resisting the attempt to reduce the matter to judgment, to a money judgment, to show that they were invalid and the reason they are invalid is that they are not supported by substantial evidence. How is that proved by bringing in evidence that was not before the Commission?

Mr. McDonald: As I understand it, in an action to enforce a reparation award, as you have indicated the case before the Commission, the report and order of the Commission constitutes prima facie evidence, (29) but there is no limitation on the court in receiving additional evidence.

The Court: That case you point out on page 3 of your brief doesn't say anything like that. Maybe it is the law, but that case does not establish it.

Mr. McDonald: Well, if I may refer you to the language immediately following it which discusses the statute itself, it "only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury."

The Court: This last part you are not quoting; it is your statement.

Mr. McDonald: That is a quote also, your Honor.

The Court: Where?

Mr. McDonald: It is included in "from section" —my understanding, your Honor, is that a quote from the State of Florida case stated immediately above it, 282 U. S.

The Court: What is a quote?

Mr. McDonald: The entire language, down to—

The Court: "shall be prima facie"—I would (30) say that the quote there, that is from a statute. I must not be following you. Are you on the top of page 4?

Mr. McDonald: No, I am at page 6, the middle of page 6. The language that I am referring you to is a quote within a quote. It is also—

The Court: Wait a minute. Very good. I will overrule the objection.

Mr. McDonald: If you will permit me, your Honor, I might also say that that is language taken directly from another Supreme Court case, Meeker v. Lehigh Valley, 236 U. S. 412, the quote appearing at page 414.

Mr. Teichner: May I be heard, your Honor?

The Court: Yes.

William J. Hickey—For Defendants—Direct.

Mr. Teichner: If the Court please, if I understand Mr. McDonald correctly, I believe that—

The Court: 236 U. S. 412?

Mr. McDonald: Yes, sir. At page 414.

The Court: All right, Mr. Teichner. Sorry I interrupted you.

Mr. Teichner: Your Honor, if I understand Mr. McDonald correctly, I believe that he is trying to urge upon the Court the fact that he may at this time and in a court of law go into the question of the reason- (31) ableness of the rates and submit evidence with respect to the reasonableness of the rates.

Now if that is his position, I submit, your Honor, that that is directly contrary to a long line of decisions by the courts and the United States Supreme Court and as a general principle that the courts will not take evidence on the administrative questions involved for the reason that that belongs entirely to the administrative body. In the case of Glens Falls Portland Cement Company v. Delaware & Hudson—

The Court: This is a rather peculiar statute, isn't it, where the Commission requires reparation and then in order to get it you have to bring a lawsuit? I don't know of any other similar statute or set-up. So the list of cases you are about to give me I am sure are cases reviewing the findings of the Commission in trying to set it aside.

Mr. Teichner: Yes. That is what the court does. The court looks at the record that is made before the Commission and determines whether or not there is any substantial evidence to support the findings of the Commission on the administrative questions, your Honor. In other words, I respectfully—

The Court: Have you any case saying that (32) under this statute that brings you into court, the defendant is limited to the evidence that he has submitted to the Commission?

Mr. Teichner: Yes. Limited on the administrative questions, your Honor. I have cited several.

The Court: What do you mean by the administrative question?

Mr. Teichner: The question as to whether or not the rate was reasonable. Now I make this distinction, your Honor: there are administrative questions and there are juridical questions. The administrative question involves the matter as to whether or not the rate was reasonable. With respect to that issue, your Honor, the Interstate Commerce Commission is peculiarly fitted to determine that proposition and once they determine the proposition and the matter is then reviewed by the court, the only function of the court I submit is to determine whether or not there is any substantial evidence to support the administrative finding of the Commission.

The Court: I am going to take all the evidence. I will take it subject to your objection and motion to strike out which you can make at the end of the case.

Mr. Teichner: I have cases on the matter.

(33) The Court: I will read them after the trial. There is no use in holding up the trial.

Mr. Teichner: I respectfully except to your Honor's ruling.

The Court: What do you mean? To give permission to make a motion to strike it all out at the end of the case? What ruling are you objecting to?

Mr. Teichner: Then I will withdraw it, your Honor. I thought that it was just being overruled.

(Defendant's Exhibit C received in evidence.)

Mr. Teichner: If I may interrupt, your Honor, I might say that I think we could save a lot of time if your Honor read this case of Glens Falls Portland Cement Company which is exactly on the point.

The Court: I will read that some time in the future. I will try the case today.

Mr. Teichner: Very well, sir.

By Mr. McDonald:

Q. Mr. Hickey, was there any other action taken by any other governmental agency in an attempt to control the use of box cars and alleviate the acute shortage, to which you have previously referred? A. Yes. The Office of Defense Transportation, an executive branch of the Government set up during the (34) emergency during the war years, issued ODT-18, in November, 1942, which was superseded by ODT-18A in October 1943 simply for the purposes of amendments. And this order continued in force until some time in 1949. It was a drastic order, the main provision of which was that cars should be loaded to their full marked capacity. And while the shipments herein were not subject to that order, it set forth the position of the Government and it was binding upon a great majority of the freight transported throughout the country during the effectiveness of the order.

The Court: What does that prove in this case?

Mr. McDonald: I think before we are through, if your Honor please, it will prove that the action of this plaintiff in making shipments substantially

below not only the minimum rate, but the cubical capacity or weight carrying capacity of the cars it used, was, while not a technical violation of the provision itself, a violation of the spirit of the thing at a time of great national peril. All that this is being offered for is to establish conclusively on the record the existence of the acute car shortage, the efforts taken by the Government in time of war and the immediate post-war period to control the box car situation for the benefit (35) of all shippers and the national welfare, and prove in this fashion the extent to which the action of the shipper, the plaintiff in this instance, was in direct conflict with the attempt of the Government to do exactly that.

The thing that is important from our standpoint is therefore a reparation order to stand under those circumstances it seems to me is awfully close to complete incomprehensibility on my part, if I may put it that way.

If the Court will permit, I would like to offer in evidence at this time Volume 7, No. 203 of the Federal Register, dated Washington, Thursday, October 15, 1942, where, beginning on page 8337 thereof, the regulation to which the witness has referred is published. It is my understanding that the Court can judicially notice it. But we have this as a matter of convenience, and with the Court's permission we would like to file it as a matter of record.

The Court: Go ahead.

Mr. Teichner: I will object to it, your Honor; I presume that I am protected on your Honor's ruling with respect to a motion to strike out.

The Court: Overruled.

(36) (Defendant's Exhibit D received in evidence.)

Mr. McDonald: If the Court please, the witness referred not only to ODT-18, so-called, the initial regulation there referred to, but to ODT-18A, which was published in Volume 8, No. 212 of the Federal Register dated Washington, Tuesday, October 26, 1943, and beginning on page 14,477 of that publication. I am unable to offer that particular one in evidence, your Honor, because it is bound and we have been unable to unbind it, so to speak. But, as I understand it, the Court will judicially notice it and I assume therefore it won't actually be necessary—

The Court: At what page is it?

Mr. McDonald: 14,477, October 26, 1943.

Mr. Teichner: I object to that, your Honor, on the same grounds stated.

The Court: Overruled.

Mr. Teichner: Exception.

By Mr. McDonald:

Q. Mr. Hickey, are you familiar with both the plaintiff's statement and the defendant's statement that together embrace 2,355 shipments, approximately, which have already been offered in evidence in this proceeding? (37)
A. Yes, sir.

Q. Am I correct that you made a check and study of the shipments shown on both of those documents? A. Yes, sir.

Q. Would you tell me briefly what your check and study disclosed? A. First, I had all the shipments checked in both of these statements against—

The Court: Is that part of Exhibit A?

Mr. McDonald: That would be part—

The Witness: These two, your Honor, if they will help you.

Mr. McDonald: Plaintiff's Exhibit 2, and B of the defendant. They are both together.

A. I had all these cars checked against the Official Railway Equipment Register, issue of October, 1945, issued by M. A. Zenobia, Agent, bearing ICC No. RER No. 227. This publication, as indicated, is on file with the Interstate Commerce Commission and lists the ownership by roads of various cars, showing car numbers, marked capacity, length, dimensions and cubical capacity of all freight cars used to transport the freight.

(38) I found that with two exceptions all cars shown in both of these shipments were of the same length, that is, 40-foot cars.

Q. What was the length of the other two cars? A. The other two cars were 50-foot cars.

Q. Now, did your check of the two statements referred to disclose a substantial variation of the weights loaded on different shipments? A. It did.

Q. Could you give the Court a few illustrations of that fact? A. Yes. I extracted from it without any difficulty —it could have been other cars—carload shipments, and this is taken of course from defendant's exhibit—

Q. Exhibit B? A. —Exhibit B, cars loaded as low as 30,038 pounds, and ranging another each 5,000 additional pounds as high as 68,200 pounds.

Q. Could you for the convenience of the Court indicate where in Exhibit B the particular shipments you are referring to appear? A. The first shipment, 30,038 pounds, was forwarded on June 7, 1945, and is shown on page 8 of Defendant's Exhibit B.

(39) The second shipment of 35,092 pounds was forwarded on August 16th, 1944, shown on page 3.

The third shipment, 40,016 pounds, was forwarded on April 1st, 1944, shown on page 2.

The next shipment, 45,368 pounds, forwarded on September 2nd, 1944, shown on page 3.

The fifth shipment, 50,134 pounds, forwarded on September 11, 1946, shown on page 16.

The next one, 54,886 pounds, forwarded on July 13, 1946, shown on page 14.

The next, 61,608 pounds, forwarded on September 30, 1946, shown on page 16.

The next shipment, 68,200 pounds, forwarded on April 16, 1946, shown on page 13.

All shipments being in 40-foot cars and could be enlarged upon.

Q. In other words, Mr. Hickey, the statement indicates on its face that these shipments were loaded in various weights anywhere from 24,000 to what I think you referred to was 68,000 pounds, is that correct? A. I used 68,200. There are others in there, 68,820, 68,374.

Q. Those were all loaded in 40-foot cars, in other words, in substantially the same type car in each (40) instance? A. Same length, same capacity car, yes.

Q. Mr. Hickey, the complaint in this proceeding before the Commission alleged that the commodity rate assailed was unjust and unreasonable and in violation of Sections 1 and 4 of the Act, and note no mention, as the record before this court will show, of the execution of any shipment; it merely assailed the commodity rate. That was the rate, as I understand it, that was applicable on any and all shipments forwarded from Syracuse, New York, to Detroit, Michigan, is that correct? A. Yes. Rule 38 of the Government classification says that if the commodity rate is published it removes the application of a class rate unless otherwise provided, which wasn't the case in the instant case.

Q. So that the assailed commodity rate would apply on any shipment regardless of the rate offered, carload shipment, regardless of the weight offered? A. That is correct.

Q. In that connection, Mr. Hickey, in the alleged evidence of witness Pollack included in the complainant's statement before the Commission, there appears a statement to the effect that the purpose of the defendant (41) in establishing this commodity rate was to grant heavier shipments a lower rate than the full classification rate because of the nature and desirability of the traffic. Is that a correct statement of fact, Mr. Hickey? A. That just couldn't be a correct statement of fact.

Q. Would you tell me why? A. Well, as I have just said, if you just publish the commodity rate, the rule of the classification specifically provides that the only legal applicable rate is that commodity rate, unless otherwise provided in the governing tariffs, and the only way you could provide for that would be by providing for alternation of the class and the commodity rate which wasn't done.

Q. Are you saying to the Court in effect that the mere failure to provide for the alternation of the classification basis on the one hand and the commodity rate on the other is clear proof that there was no intention to provide a commodity rate solely for application on heavy loaded shipments; is that a correct statement? A. Absolutely so.

Mr. Teichner: I object to this witness's (42) testimony on the grounds I stated before, and further on the ground—

The Court: I think the last question and answer might be argumentative but they are helpful to me, so I will allow them to stand.

Mr. Teichner: I respectfully except.

Q. Now, as part of your study of all of the shipments made by the plaintiff from Syracuse to Detroit, did you uncover instances where on one hand the assailed rate—where the assailed rate alleged to be unreasonable now with respect to so-called low weight loaded shipments was nevertheless applied on shipments of substantially greater weight? A. Oh, yes.

Q. What would be the effect, Mr. Hickey, if this court were to enforce the reparation order of the Interstate Commerce Commission in an instance of that kind? Could you direct out attention to two or three representative illustrations of how that would actually work?

Mr. Teichner: I object to that, your Honor; it is incompetent, irrelevant and immaterial, and certainly not binding on the plaintiff, the court, or anybody else.

(43) The Court: I will allow it.

Mr. Teichner: I respectfully except.

A. The statement is contained in our brief that if the higher class rate to lower minimum weight applied on the entire 2,300 and some odd shipments that the railroad would have received approximately $26,500 more revenue.

Possibly to clear the record a bit I have here just three examples of how this would work, and the three cover each period where there was a rate change.

Starting first in the period between April 1st, 1944, and June 30th, 1946, where the lower commodity rate was 37 cents subject to a minimum of 30,000 pounds, the carload minimum charge was $111. At that time the class rate was 42 cents, subject to 24,000 pounds.

And if that had been applicable on any shipments the minimum charge would be $100.80.

Included on Plaintiff's Exhibit 2—

Q. Just one minute, before you turn to that, Mr. Hickey.

Mr. McDonald: If the Court please, the crux of this matter, in its technical application, if I may put it that way, is the contention on the part of the (44) complainant that a commodity rate of 37 cents subject to a 30,000-pound minimum weight is unlawful because it exceeds a class rate of 42 cents to which a lower minimum weight applied.

Q. As I understand it, Mr. Hickey, the point between the 30,000 pounds minimum weight applicable in connection with the commodity rate and the 24,000 pounds minimum applicable in connection with the class rate, the typical point there which would completely do away with any mention of unreasonableness is 26,431 pounds, is that correct? A. Yes.

Q. That results in a charge of how much? A. $111, the same.

Q. Or the same as the commodity rate at the commodity minimum rate? A. That is correct.

Q. So that any shipment 26,431 pounds or over could not violate, within the meaning of Sections 1 or 4, the Act by reason of the commodity rate resulting in charges in excess of those which would be accrued on the classification basis; is that correct? A. As a traffic man I would rather say that there would be—that any shipment 26,431 pounds and (45) higher, lower per car charges would be produced by application of the commodity rate and the minimum.

Q. Of the assailed commodity rate and minimum? A. That is correct.

Q. The other two periods, without going into that same detail, as I understand it, ran from July 1st, 1946 and January 1, 1947, to August 21, 1947; those are the three periods in which these three sets of rates were in effect, were published for application on this or other traffic, isn't that correct? A. Yes.

Q. In the case of the latter two, whereas the typical weight figure was 26,431 pounds, in the case of the second bloc it decreased to 26,171 pounds, is that correct? A. Yes.

Q. In the case of the third bloc, a further decrease to 26,039 pounds, is that correct? A. That is right.

Q. Would you proceed now, please, with your representative illustrations? A. On Plaintiff's Exhibit 2, page 15, there is a shipment forwarded on June 29, 1946, weighing 25,496 pounds on which the legally applicable charges were (46) based on the commodity rate of 37 cents and the minimum weight of 30,000 pounds, or $111.

The basis of reparation, using that weight, 25,496, and the class rate of 42 cents, produces alleged car charges of $107.08, or reparation on this car in the amount of $3.92.

On the same date, as shown in Defendant's Exhibit B, June 29, 1946, on page 14, there was also, among other shipments forwarded on that date, a car containing 68,820 pounds of freight on which the legally applicable charges were collected on the basis of the assailed commodity rate of 37 cents at minimum of 30,000 pounds, producing charges of $254.63. If the commodity rate hadn't been in effect the only applicable rate would be the column 40 class rate of 42 cents and the charges on this shipment would have amounted to $289.04.

Therefore, if there was some way in which the basis of reparation on a higher class rate could be assessed against this shipment the railroad would have received revenue, additional revenue, of $34.41.

Q. Mr. Hickey, are you saying in effect that had the 42-cent rate on which the Commission would award reparation on the first shipment been published and (47) legally applicable, it would have resulted in higher charges on the second shipment of 68,000 pounds to the extent of $34.41? Is that the substance of your testimony? (Question read.) A. Yes. I did not understand the question at first. That is correct.

Q. Would you proceed, Mr. Hickey. A. It is correct that if the 42-cent rate had been applicable, the higher class rate, the charges, the railroad would have received $34.41 additional revenue over and above what they did receive.

Q. Do you have any additional illustrations of this kind? A. Yes. I take the second period during which the rate changed, July 1st, 1946, to December 31, 1946, when the commodity rate was increased to 41 cents, still subject to the minimum of 30,000 pounds, and the class 40 rate was increased to 47 cents.

The dividing point where the class rate would produce and minimum would produce lower charges than the commodity rate is 26,171 pounds. On complainant's exhibit 2, on page 15, there is shown a shipment on December 24, 1946, on which the legally applicable charges were collected on the basis of the commodity (48) rate of 41 cents at a minimum of 30,000 pounds, producing per car charges of $123.

The basis of reparation would provide for application of the 47-cent rate at minimum of 24,000, or per car charges of $112.80, meaning producing reparation in the amount on this car of $10.20.

On the same day, on Defendant's Exhibit B, on page 18, there were three other shipments forwarded, one of which weighed 68,462 pounds on which charges were collected, based on the assailed commodity rate of 41 cents, amounting to $280.69. Had the class rate applied on this shipment, the class rate being 47 cents, the per car charges would have been $321.77 and the railroad would have secured additional revenue of $41.08 on this particular shipment.

Turn to the next to the last period of rate changes, January 1st, 1947, to August 21, 1947, during this period the commodity rate was 46 cents and still subject to minimum of 30,000 pounds, the class rate was 53 cents at minimum of 24,000 pounds.

On Defendant's Exhibit B, on page 17, two shipments are shown as being forwarded on July 11, 1947, and one of which I have taken as an example weighing 25,512 pounds, on which the legally applicable charges (49) were based on a commodity rate of 46 cents at minimum of 30,000, producing charges of $138.

Under the basis of reparation, a rate of 53 cents would be assessed on the actual weight, producing per car charges of $135.21, reparation amounting on this particular car to $2.79.

Turning to Defendant's Exhibit B, on page 23, I have taken a shipment of July 10, 1947, weight 68,820 pounds, on which the legally applicable charges were collected on the basis of the assailed commodity rate of 46 cents, amounting to $306.57.

Had the class rate been applicable on this particular shipment the charges would have amounted to $364.75, which would mean that the railroad would have secured additional revenue of $48.18 on this particular car.

I use these as examples. It could be well multiplied.

Q. Mr. Hickey, I understand that on August 22, 1947 the class 40 rate was increased under an order of the Interstate Commerce Commission to 58 cents per hundred pounds, with no change in the commodity rate, and that was a matter in which any semblance of illegality in this rate situation was corrected; is that true? (50) A. That is correct. The interim basis of class rate under 28,300.

Q. By the way, Mr. Hickey, during the actual period in which the two thousand odd cars here involved moved from Syracuse to Detroit, did the defendant give any consideration to the cancellation of the applicable commodity rate because of any tendency on the part of the plaintiff to light load its shipments? A. Yes, sir.

Q. Did the Office of Price Administration approve or disapprove of its efforts in that respect? A. The Office of Price Administration had control over charges for

railroad transportation during the war period, the same as they did any other goods that anybody was selling; and it was impossible to increase a rate if anybody at all raised any objection to it, as in this case they would. The shipper indicating to us that he didn't want the commodity rate cancelled as they intended to use it, the light loaded cars were just one of those things that happened.

Q. After the complaint in the proceeding was filed, did the defendant again give consideration to the cancellation of this commodity rate? A. The answer to that question is yes, after the (51) informal complaint was filed with the Commission, because by the time the formal complaint was filed the condition ceased to exist, due to the increase in the class rate.

Q. At the time the informal complaint was filed, did the complainant before the Commission, the plaintiff here, again object to the cancellation of that commodity rate? A. Yes, sir.

Q. Were more than one car generally loaded on the same day by the plaintiff for shipment from Syracuse, New York, to Detroit, Michigan? A. There were many days on which there were two or more cars loaded with this commodity from Syracuse to Detroit. By collating, or by comparing Plaintiff's Exhibit 2 and Defendant's Exhibit B, you can just look at the dates and they repeat on one, and then when you go to the other you add to it.

I would like to point out one that to my mind is really startling and why I use it. It embraces the two shipments that I used in my first example to indicate the difference in the basis of reparation and what the railroad would have received if the class rate had been on our higher weighted car.

(52) Turning to page 15 of complainant's exhibit 2, you will find that on June 29, 1946, three cars were loaded weighing 25,496, 24,000, 24,835.

By turning to page 14 of Defendant's Exhibit B, it will be found that on the same date, June 29, 1946, five cars were forwarded, weighing 34,555 pounds, 31,790 pounds, 27,147 pounds, 68,820 pounds, and 35,520 pounds.

These eight cars total 272,163 pounds, or an average for the eight cars of 34,020 pounds.

Bearing in mind that I have given examples of loadings from 30,000 as high as 68,000, and the statement, Defendant's Exhibit B, is replete with them, it would not be at all difficult, it would be easy, I would say, to have loaded this entire freight in seven cars, which would only be an average weight of 38,880 pounds, thereby on this single day saving one box car.

Assume for a minute—or I had left out of my calculation the heavy loaded car, that 68,820 pounds, in which it is conceded there could not be any more put into it, the gross weight of the other seven shipments was 203,343 pounds, representing actual weight on the basis of actual loading average weight, for the seven cars, of 29,049. Had this tonnage been loaded in one less car, six cars, the average weight in each (53) car would be 33,890 pounds, which could very easily be loaded in any of these box cars, based on the evidence in the proceedings.

I could give examples, all through it; I have an instance here of shipment on July 5, 1944, where the four cars were forwarded on the same day with an average loading of 25,820 pounds.

Had three cars been used, each car would have contained 34,433 pounds.

I have shipments, for example, forwarded on February 20, 1945; on that date all of the shipments are contained in Plaintiff's Exhibit 2 because that day the shipper only loaded light cars, no heavy cars at all. The loadings on those cars, as shown on page 6 of Plaintiff's Exhibit 2, were 24,000, 24,510, 24,000 and 24,000, a total weight of

96,510 pounds, or an average weight in each car of 24,127 pounds.

If these four shipments forwarded on the same day had been loaded in one less car, complying at least with the spirit of ODT-18, there would have been in the three cars an average load of 32,170 pounds, way below the average loading of the entire shipment.

I could go on; I have example after example. Five cars used on the same day, four could have been used, (54) on June 17, 1944; November 16, 1944.

Q. Mr. Hickey, are the two illustrations of the latter character that you have just given—would you say those were representative of additional that you might have? A. Yes. There are many others that I could pick.

Mr. McDonald: That is all.

Mr. Teichner: Your Honor, I have no questions of this witness. But at this time I would like to move respectfully to strike out the testimony of this witness on the question of reasonableness of rates. And also to object to Defendant's Exhibits C and D, on the ground that this court is without power to decide de novo the question of the reasonableness of the rates that are involved in this case.

The sole inquiry that is within the province of this court to go into is the question as to whether or not there is any substantial evidence.

The Court: Some of your evidence was before the Commission, wasn't it?

The Witness: Sir?

The Court: Some of this evidence that you have testified to was before the Commission?

The Witness: Certain of it, yes, sir.

(55) Mr. Teichner: Your Honor, may I proceed? It is not within the province of this court to receive further evidence on the administrative issue of reasonableness and the sole inquiry is whether or not there was any substantial evidence before the Commission to support its findings with respect to the reasonableness of the rates in question.

The Court: I will deny your motion.

Mr. Teichner: I would respectfully except, your Honor.

Mr. McDonald: The defendant rests, your Honor.

The Court: Both sides rest.

Mr. Teichner: Yes, your Honor, both sides rest.

Mr. McDonald: At this time, if the Court please, I would like to renew my former motion that the complaint before the Court be dismissed on the grounds previously stated, and on the further ground set forth in the defendant's brief which has already been submitted to the Court.

The Court: I will reserve decision. I suppose you move for judgment also?

Mr. Teichner: Yes, your Honor.

The Court: I reserve decision. On some (56) of the evidence I entertain so much of your last motion as moving to strike out the introduction of evidence outside of and beyond the matters introduced before the Commission, I will reserve decision on that.

Anything else?

Mr. Teichner: Nothing further.

Mr. McDonald: I am wondering—

The Court: If I take the statement that you pointed out to me on page 6, the excerpt from an opinion, literally there is no question about the law being in your favor, but I want to look it up.

Mr. McDonald: I was merely going to ask the Court—I think we are entirely correct on that point, your Honor, that we are here entitled to a trial de novo in a reparation proceeding—I was just wondering and about to ask the Court if the Court would deem it helpful if we were to submit supplemental briefs that to some extent would endeavor to throw some light on the very point.

The Court: I would like it. I invite them.

(Discussion on briefs.)

(120)

Opinion and Judgment

CLANCY, D. J.

FINDING OF FACT.

1. There was evidence before the Commission to sustain each of its findings, including the finding of damage.

CONCLUSION OF LAW.

1. Judgment is granted the plaintiff in the sum of $6,550.81 with interest at the rate of 4 per cent, as fixed in the Commission's order allowing reparation, dated August 2, 1954, plus the sum of $2,183.60 as counsel fee.

The motion to strike evidence on which decision was reserved at the conclusion of the trial must be granted. *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.* 66 F. (2d) 490, Cert. Denied 290 U. S. 697.

The inartistic language employed by Division 3 in formulating its decision appears to have occasioned some difficulty in this case. Thus the Division said it applied a presumption to the comparison of the rates obtaining on east-west bound and west-east bound traffic. What it actually did was impose upon the railroad the burden of proof of justifying circumstances. *Zenith Dredge Co.* v. *Northern Pacific Ry. Co.*, 268 I. C. C. 59, 61. Before Division 3, the railroad presented nothing on this issue.

(121) In the same way, though the word presumption was used, it was held that where a car load minimum weight in connection with a commodity rate results in a higher charge than under a class rate with a lower minimum, the commodity rate is unreasonable unless especially justified. The material submitted by the railroad in respect to this

phase of the case was a recital of fifty eight shipments made within three weeks and their average weights and the charges that accrued under the commodity rate and what would have accrued under the class rate upon such average weight. This was rejected as not necessarily indicating the reasonableness of the rate on certain low weighted cars. Of course it never was submitted to compel that conclusion but to provide an illustration of the rate's operation in practice which was offered to show its over all reasonableness. But we cannot say that it was not considered because it was examined, though held insufficient in language that ordinarily might be thought to mean it was arbitrarily and wholly rejected and ignored. Similarly the holding that this material was not representative might indicate to a reasonable man that the Commission wholly missed the point it was intended to make. However captious and wrong we might think the rejection of the three weeks showing of the operation of the commodity rate on the complainant's shipments, we do not believe this is any reason why the Court may upset the finding. *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co., supra.*

The section four departure was based upon a "paper" (122) departure which nevertheless was technically a fact. It does not, as the railroad says, support a requirement of reparation without proof of special damage. *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 415. But in this case it was not the sole basis of the Commission's decision.

Finally, this Court cannot sustain the complaint against the denial of the motion to reconsider. All public officers are assumed to perform their duty in the absence of proof to the contrary. A summary of the result in terms of money of all the business between the complainant and the railroad was submitted with the application for reconsideration. It showed that the shipper over all had saved money under the commodity rate. Nevertheless the mo-

tion was denied. In such circumstances we must conclude that the Commission gave some attention to all of the railroad's proof submitted to it and somehow reached the conclusion that the ultimate decision of its Division was correct. In the absence of a Commission refusal to find the commodity rate unreasonable in the past as it has done when so inclined, the Court may not forgive reparations.

What the Commission effectually did in this case was impose an alternate rate, something it had often protested it did not require as part of a fair rate basis. *American Popcorn Company* v. *Atchison T. & S. F. Ry. Co.*, 182 I. C. C. 230; *Vacuum Cleaner Mfrs. Ass'n.* v. *Atchison T. & S. F. Ry. Co.*, 276 I. C. C. 783, 792. It apparently gave scant attention to the raising of the class rate, a fact that a Court would think quite important. (123) But it mentioned the fact of the raise. Its decision appears to be something of an innovation; it condemned a commodity rate only as it applies to low weight shipments and not its over all application and in this case, which involves past traffic, where the rate no longer obtains. One of the two authorities it cites for this last point involved a single shipment and the other two one-car shipments with a brief time span, so they are not true precedents. Consistency is not a marked characteristic of the Commission's decisions which the Court has examined though railroads ought to be able to know what the rules are. But the Court is unable to hold that the Commission failed to consider these matters in the light of the facts submitted to it.

Dated: New York, N. Y., January 11, 1957.

/s/ JOHN W. CLANCY,
United States District Judge.

Defendant's Exhibit "A" (Record before the Interstate Commerce Commission)

COMPLAINT BEFORE THE INTERSTATE COMMERCE COMMISSION

NEW PROCESS GEAR CORP.

v.

THE NEW YORK CENTRAL RAILROAD COMPANY

1. Complainant is a corporation engaged in the manufacture of automobile parts, at Syracuse, N. Y.

2. The defendant above named is a common carrier engaged in the interstate transportation of property by rail and is subject to the provisions of the Interstate Commerce Act.

3. The complainant in the regular course of its business has made carload shipments of automobile driving gear parts, iron or steel, which moved over the defendant's lines from Syracuse N. Y., to Detroit, Mich., on which shipments the defendant charged and collected at rates of 37¢, 41¢ and 46¢ subject to minimum weight of 30,000 lbs. per carload.

4. Complainant has paid and/or borne the freight charges assessed and collected by the defendant upon the shipments involved herein, and this matter was the subject of informal complaint No. 174,238 which was closed on April 11, 1950.

5. The rate and charges assessed by the defendant, and paid by complainant upon the shipments herein were unjust and unreasonable, in violation of Sections 1 and/or 4 of the Interstate Commerce Act, to the extent that they exceeded rates of 42¢, 47¢ and 53¢ respectively, subject to minimum of 24,000 lbs. per carload and charges based

thereon, which complainant deems reasonable. The contemporaneous rates from East Syracuse, N. Y. (a more distant point, to which Syracuse is intermediate), and also the rates from Syracuse, N. Y. to Dearborn, Mich. (Detroit being intermediate to Dearborn) where 42¢, 47¢ and 53¢ observing a 24,000 lb. minimum; authority Agent Curlett's I. C. C. A-766.

6. Wherefore, complainant prays that the defendants may be required to answer the charges herein; that after due hearing an order be made commanding said defendant to pay to complainant by way of reparation for the unlawful charges collected on shipments during the period from April 9, 1944 to August 21, 1947, the sum of $5,000.00 or such other sum as the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

NEW PROCESS GEAR CORP.

By A. E. WOONTON Its Treasurer

Dated April 19, 1950 at Syracuse, N. Y.

ABNER POLLACK
Practitioner for Complainant
1126 Westchester Ave., New York 59, N. Y.

COMPLAINANT'S MEMORANDUM OF FACTS AND ARGUMENT

STATEMENT OF FACTS

Complainant is a corporation engaged in the manufacture and sale of automobile parts at Syracuse, N. Y.

Defendant's Exhibit "A".

During the period from April 9, 1944 to August 21, 1947, complainant has made numerous carload shipments of autombile driving gear parts, made of iron or steel, which were forwarded from Syracuse, N. Y., to Detroit, Mich., over the New York Central Railroad Co. Some of the shipments which moved prior to April 20, 1945, included in addition to the gear parts, quantities of machine parts made of iron or steel.

The shipments here involved were sold F.O.B. Detroit, Mich. The transportation charges were assessed by the New York Central Railroad Co., and paid and borne by New Process Gear Corporation at rates ranging from 37 cents to 46 cents per cwt.

The susceptibility of these gear parts and machinery parts to damage or loss in transit is practically negligible, and no claims for loss or damage have been filed on this traffic. These shipments do not require special or expedited service. The movement of this traffic is regular and substantial.

Complainant contends that the rates complained of herein were unjust and unreasonable, in violation of sections 1 and/or 4 of the Act, and prays that the defendant be required to pay reparation on the shipments in question.

I hereby take oath that I have been in complainant's employ for a number of years and throughout the period covered by this complaint and am familiar with the aforegoing facts; that I have access to and have examined complainant's books and records covering the shipments here involved; and that this statement of facts is true and accurate and in accord with the books and records of the complainant.

NEW PROCESS GEAR CORPORATION

By M. Graham, its Sales Manager

Defendant's Exhibit "A".

My name is Abner Pollack and my residence New York, N. Y. For approximately 30 years I have been engaged in freight rate and traffic work, and have acquired a general knowledge of transportation conditions existing in official classification territory, having appeared in many rate and classification cases before the Interstate Commerce Commission.

I represent New Process Gear Corporation, for whom I have handled traffic matters for approximately 20 years, and am fully familar with its shipments, especially its shipments of automobile driving gear parts in straight and in mixed carloads with machine parts, having been in constant touch with complainant and having made a thorough study and analysis of the rate situation covered by this proceeding. I have carefully examined the freight bills, and representative bills of lading and invoices covering the shipments involved herein.

This complaint was previously the subject of informal complaint No. 174,238 which was closed on April 11, 1950.

The shipments involved consisted of carloads of automobile driving gear parts made of iron or steel, a number of the shipments also contained some machine parts made of iron or steel.

All of these shipments were loaded into the cars by the complainant at Syracuse, N. Y., and were forwarded to Detroit, Mich., over the New York Central Railroad Co., moving through Suspension Bridge, N. Y. The cars were unloaded by the consignee.

I have made a careful study of the transportation characteristics of the gear parts and machine parts contained in these shipments. The susceptibility of these articles to damage or loss in transit is practically negligible and there have been no claims for loss or damage on these shipments. These articles do not require special or expedited service and the movement here involved is regular and substantial.

Defendant's Exhibit "A".

During the year 1944 the volume here in issue totaled 165 carloads; in addition to which there were a number of heavier shipments but not here involved by reason of their greater weight as will be hereinafter apparent. In view of these facts, the shipments involved should be considered as constituting desirable traffic from a transportation standpoint.

These gear parts and machine parts are rated Class 40, minimum weight 24,000 pounds subject to Rule 34, in the Consolidated Freight Classification. That basis was voluntarily established by the carriers and has been in effect for a great many years. Cars measuring 40 feet 7 inches in length or less, were used for loading these shipments.

The following table shows the rates assailed and sought also earnings thereunder, and the distance shown applies over the short line route which is also the route of movement:

Distance in Miles	*Rate*	*Minimum Weight*	*Earnings (1) Per Car*	*Per Car Mile*
		Commodity Assailed Rate		
385	37¢	30,000 lbs.	$111.00	29¢
		Class Rate Sought		
385	42¢	24,000 lbs.	$100.80	26¢

(1) Based on the respective carload minimum weights.

Tariff Reference: Agent Curlett's ICC A-766 and ICC A-758.
Mileage Authority: NYC ICC 16802 and NYC ICC 5196.

The rates shown are the base rates and apply to the shipments which moved prior to July 1, 1946. Effective July 1, 1946, the base rates of 37¢ and 42¢ were increased to 41¢ and 47¢ respectively, under Ex Parte 148; and

effective for the period from Jan. 1, 1947 to and including Aug. 21, 1947, the said base rates were further increased to 46¢ and 52¢ respectively under Ex Parte 162. The minimum weights shown in the table did not change throughout the entire period here involved.

All rates stated in this memorandum will, unless otherwise indicated, be the base rates (without the Ex Parte 148 and 162 increases), and be stated in cents per hundred pounds.

Attached hereto and marked Exhibit No. 1 are copies of two representative freight bills dated May 4, 1944 and July 1, 1944, covering the shipments in issue.

It will be noted from waybill No. 5683, that the freight charges covering those shipments which contained machinery parts in addition to the gear parts, have been rated in accordance with the mixed carload rule as published in Agent Curlett's I.C.C. A797, item 408; the gear parts being accorded the commodity rate of 37¢ and the machine parts the class 40 rate of 42¢. Also, the number of pounds making up the deficit in the 30,000 lbs. minimum weight, is charged at the class 40 rate as authorized in Section 1 of said item No. 408.

As is shown in the table on sheet 4 of this memorandum, while the assailed commodity rate does not by itself appear to exceed the corresponding class rate, the commodity rate in combination with the minimum weight factor of 30,000 lbs. has resulted in higher charges than under the class rate with the lower minimum weight of 24,000 lbs., and in such a situation there is a clear presumption of unreasonableness. In *Butte Fruit and Produce Co.* v. *Northern Pacific Ry. Co.*, 178 I.C.C. 370, 372, the Commission awarded reparation in a comparable situation and stated as follows:

> "The fifth-class rate and the commodity rate beyond Spokane were the same in amount but the minimum

in connection with the commodity rate 31,000 pounds, and in connection with the class rate was 24,000. A presumption of unreasonableness attaches to higher charges resulting from the use of the minimum in connection with the commodity rate, and from through charges higher than the aggregate of intermediate charges, both of which require special justification."

It is well established by the many decisions of the Commission that the classification generally imposes the highest rate which a particular commodity should bear under normal conditions (196 I.C.C. 751, 754). A commodity rate by itself, or in connection with a minimum weight factor which results in higher charges than at the class rate, is an abnormal adjustment and one which on its face requires special justification (186 I.C.C. 733, 735). Such a rate situation raises a clear presumption that the higher rate and charges are unreasonable (148 I.C.C. 662, 663). This presumption is strengthened by the fact as in the instant case, that with very few exceptions, between all points in official classification territory, class 40 rates and charges based thereon invariably apply on like traffic (160 I.C.C. 28, 30).

All of the freight bills here involved cover shipments weighing considerably less than 30,000 lbs., and in fact over 90% of these shipments weigh less than 24,000 lbs. per cwt. Obviously, the heavier shipments are not here in issue for the charges thereon at the commodity rates are lower than at the class rate. The purpose in establishing the commodity rate was to grant the heavier shipments a lower rate than the full class rate, because of the nature and desirability of this traffic. For commercial reasons, however, it was impractical for complainant to heavily load all of the cars; and certainly these facts can by no means justify penalizing the lighter shipments and

applying charges thereon in excess of those based upon the maximum reasonable class rates.

This abnormal rate situation could have easily been promptly corrected by merely amending the particular item of the commodity tariff naming the 37¢ commodity rate subject to minimum of 30,000 lbs., to include in the item, an alternative commodity rate of 42¢ subject to minimum of 24,000 lbs. This method of publishing rates based upon different minimum weights, is by no means unusual and is applied by this defendant in many instances, and there appears to be no reason for having withheld such corrective measure in this instance.

The contemporaneous class 40 rate on corresponding traffic from Syracuse, N. Y. to Dearborn, Mich. as well as from East Syracuse, N. Y. to Detroit, Mich. was 42¢ subject to minimum weight of 24,000 lbs. This results in a lower charge than that applied to the instant shipments, from which it is clear that there is both an origin and destination fourth section violation, for Detroit is directly intermediate to Dearborn and Syracuse is directly intermediate to East Syracuse. This is very plainly set forth in the informal complaint corresondence, and the following is cited from the Commission's letter dated May 13, 1948 addressed to the defendant:

> "Following receipt of your last letter of declination dated Dec. 22, 1947, the Commission made an examination of the tariffs in its files for the purpose of determining if a Fourth Section violation existed. That examination discloses that there is both an origin and destination Fourth section violation. It is found that Agent Curlett's I.C.C. A-766 published class rates from East Syracuse and Syracuse, N. Y. to Detroit and Dearborn, Mich., subject to the ratings named in the governing classification, Agent Greenly's I.C.C.-O.C. No. 60, as follows:

Defendant's Exhibit "A".

Classes		
3	4	40
74¢	53¢	42¢

"Agent Curlett's I.C.C. A-758 named in Item 1421-A of Supplement 54 of November 15, 1943, a commodity rate of 37 cents per 100 pounds from Syracuse, N. Y. to Detroit, Mich., on 'Engine driving gear or steering gear parts, NOIBN, in Official Classification, Iron or Steel, minimum weight 30,000 pounds.' The rates in this tariff do not alternate with class rates.

"There is, therefore, merit to the complainant's contention that the class rate from Syracuse and East Syracuse, N. Y. (a more distant point, to which Syracuse is intermediate) also that the class rate from Syracuse, N. Y., to Dearborn, Mich. (Detroit being intermediate) was 42 cents observing a 24,000 pound minimum, which would make a lower charge than the commodity rate, and is therefore prima facie unreasonable and in violation of Section 4 of the Interstate Commerce Act."

Under the revision of class rates as authorized in Docket 28300, effective August 22, 1947, the class 40 rate between the points here involved was increased from 42 cents to 47 cents. This change in class rates had the effect of eliminating the fourth section departure. However, this does not alter the fact that on shipments prior to that date the assailed rate did involve a fourth-section departure and that it was prima facie unreasonable to charge more for the shorter than for the longer haul. Nor can it be held that the higher rate was justified because it may have been technically protected by a Fourth Section application. The following citations are in point:

Defendant's Exhibit "A."

"In Patterson v. L. & N. Railroad, 269 U. S. 1, the United States Supreme Court expressed the view that 'apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter than for a longer haul.' The fourth-section departure in the present case was protected by an appropriate application, but, notwithstanding that fact, the burden of proof is upon defendants to show that the rates assailed were unreasonable. Southern Scrap Material Co. v. L. & N. R. R. Co., 140 I.C.C. 573, 575." Phoenix Horse Shoe Co. v. C.C.C. & St. L. Ry. Co., 144 I.C.C. 398, 400.

"Although this fourth-section departure was protected by an appropriate application, its existence raises a presumption that the higher rate to Ashland was unreasonable. Tri-State Traffic Co. v. L. & N. RR Co., 161 I.C.C. 137." Watters-Tonge Lumber Co. v. S.A.L. Ry., Co., 178 I.C.C. 735, 736.

The Commission has in a number of cases held that an unauthorized Fourth Section departure, whether protected by a pending application for relief or not, is prima facie unreasonable (178 I.C.C. 735 and 201 I.C.C. 281). Such departure is sufficient to support a finding of unreasonableness if not rebutted (181 I.C.C. 162, 163), notwithstanding the fact that the Fourth Section departure has been subsequently eliminated (167 I.C.C. 207, 209). The burden of proof in such instances is on the carrier and failure to rebut would leave the Commission no alternative than to declare the rate or charge to the intermediate point unreasonable and reparation should be awarded (169 I.C.C. 142 and 176 I.C.C. 1, 151, 152).

In the case entitled "Liquefied Petroleum Gas in the South and Southwest", 259 I.C.C. 55, the Commission refused to sanction Fourth Section departures which would

result from application of a commodity rate in connection with a lower minimum weight, even where the difference was very small, amounting in several instances to less than $2.00 per car, and the following citation is taken from page 59 of the report in that case:

> "Under the proposed adjustment, the fourth-section departures would be the same in character as those heretofore authorized in connection with the present rates, including origin and destination departures over circuitous routes, and origin departures over the direct routes where the traffic moved from a lower-rated group through a higher-rated group, and, in addition, the proposed rates will result in slightly lower per-car charges to the Arkansas destinations than to intermediate destinations in the Southwest, where no change is proposed in the present rates and weights. For example, it is proposed to increase the rate on the gas from Sheerin, Tex., to Forrest City, Ark., 815 miles, from 27 to 37.5 cents. The latter, at the prescribed estimated weight of 4.7 pounds, based on 10,000 gallons at a specific gravity of 0.59, will yield $167.29 per car, while a rate of 27 cents, with an estimated weight of 6.6 pounds, would continue in effect to intermediate destination Apex-Palestine, Ark., 578-808 miles, yielding $169.14 per car or $1.85 higher. Incidentally the present 27-cent rate from Sheerin to Forrest City, with the 4.7 pound estimated weight, yields only $120.45 per cwt., while the rates to intermediate destinations, Faulkner, Tex., to Palestine, Ark., inclusive, 192 to 808 miles, ranging from 19.5 to 27 cents, based on the 6.6 pound estimated weight, yield per-car earnings ranging from $122.18 to $169.14, far more serious departures than under the proposed rates. This type of departure has no

justification, and can and should be avoided entirely by applying the same bases of rates and weights to the intermediate destinations as approved herein on the traffic to the more distant destinations."

Also, in Karchmer Iron & Metal Co. v. Director General, 55 I.C.C. 730 involving a similar question the Commission said that in determining aggregate charges, minimum weights are considered in connection with the rates to or from the intermediate and farther-distant points.

The abnormality of the assailed rate and charges by reason of the fact that it exceeded the corresponding class rate, also aggravated by the fact that the assailed rate involved fourth-section departures, is further heightened by the fact that the commodity rate and charges exceeded the charges at the class rate which was actually prescribed by the full Commission in the Eastern Class Rate Case, Docket 15879. In other words, here the presumption of unreasonableness is additionally beyond rebuttal, the class rate basis sought having been approved by the Commission. *Relative* reasoning is found in the report in *Bronstein* v. *Baltimore and O. R.R. Co.*, 215 I.C.C. 136, 140, wherein the Commission held:

"A rate to an intermediate point higher than the rate to a farther distant point creates a prima facie presumption that the rate to the intermediate point is unreasonable, but that presumption may be rebutted by the fact that the rate to the intermediate point is on the basis found reasonable by the Commission."

In that case the assailed rate had been previously found reasonable, whereas here the situation is in reverse for the rate sought by this complainant was found reasonable by the Commission.

Defendant's Exhibit "A."

There can be no justification for penalizing a shipper to pay freight charges on the basis of a rate resulting in charges in excess of those at the maximum reasonable rate *prescribed by the Commission*. Nor can there be a logical defense for applying the higher charges which exceed the classification basis generally in effect throughout the same territory, and furthermore in *Alternation of Class and Commodity Rates*, 186 I.C.C. 733, 735, the Commission said:

> "We have in many cases expressed the view that the classification generally imposes the highest rate which a commodity should bear under normal conditions and that a commodity rate higher than the class rate is an abnormal adjustment which requires much to justify it. *El Dorado Chamber of Commerce* v. *Ark. R.*, 151 I.C.C. 633."

Normally, rates and charges on similar traffic should be the same in both directions, and especially as here where the transportation conditions are the same or substantially similar (39 I.C.C. 556 and 77 I.C.C. 473, 495). Complainant has in fact actually received a number of carload shipments representing return movements of these driving gear parts from Detroit, Mich., to its plant at Syracuse, N. Y., on which shipments the class 40 rate of 42¢ subject to minimum weight of 24,000 lbs. was applied. The maintenance of a higher carload charge westbound than on eastbound traffic, on its face requires explanation (142 I.C.C. 190), and in this instance it is apparent that no logical explanation or justification exists.

The assailed commodity rate of 27¢ subject to minimum of 30,000 lbs. was first established on October 20, 1941 as published in item 1421 of supplement No. 32 to Agent Curlett's I.C.C. A707. In other words on that date the charges on this particular traffic when loading around 24,000

lbs. per car were in fact increased; and under Section 15(7) of the Interstate Commerce Act, where a rate or charge assailed has been increased since January 1, 1910, the burden of proof is on the carriers to establish their lawfulness (164 I.C.C. 487, 488), and this applies both as to the total through charges or the separately stated charges which make up the total (87 I.C.C. 740, 747).

The evidence of complainant clearly establishes that the rates on automobile driving gear parts in straight and in mixed carloads with machine parts involved, were unreasonable.

Complainant submits that the evidence will require that the Commission find that the rates on the shipments in question were unreasonable, and having so found, reparation would follow as a matter of course.

It has been shown that complainant paid and bore the freight charges on the shipments in question. Under the circumstances, if the Commission finds the rates to have been unreasonable, complainant has been damaged and is entitled to reparation. It is the uniform policy of the Commission to grant reparation in such cases. (Cotton Manufacturers Ass'n v. C. C. & O. R.R. Co., 57 I.C.C. 584, 587), and the question of complainant's right to reparation is disposed of, by the Darnell-Taenzer Co. case, 245 U. S. 531.

Conclusion and Suggested Finding.

In conclusion, complainant submits that the evidence supports the following finding, and that the Commission should find:

That the rates assessed on complainant's shipments involved were unreasonable to the extent that they exceeded charges which would have applied at the corresponding class 40 rates subject to minimum of 24,000 lbs.; that the

complainant made the shipments as described and paid and bore the charges thereon; that it has been damaged thereby and is entitled to reparation in the amount of the difference between the charges paid and those which would have accrued on the basis of the rates herein found reasonable, together with interest from dates of payment.

I hereby take oath that the statements and argument contained on this and the 10 preceding pages, and that Exhibit No. 1 attached hereto, all of which are a part of this document, are to the best of my knowledge and belief, true and accurate.

ABNER POLLACK,
Practitioner for Complainant,
1126 Westchester Ave., New York, N. Y.

* * * * * *

Docket No. 30599

NEW PROCESS GEAR CORPORATION

v.

THE NEW YORK CENTRAL RAILROAD COMPANY

DEFENDANT'S MEMORANDUM OF FACTS AND ARGUMENT

AFFIDAVIT OF CHARLES COUGHLIN

My name is Charles Coughlin. My business address is 466 Lexington Avenue, New York 17, N. Y. I have had 43 years of railroad experience, and have been employed by The New York Central Railroad Company in various ca-

pacities since November, 1917. Since July 1, 1943, I have been Assistant General Freight Agent in charge of complaint and commerce work.

I have read the complaint in this proceeding, as well as the complainant's memorandum of facts and argument, and I am fully conversant with the issues raised therein. Based on my own investigation of the facts pertaining to these shipments, and of the rate and tariff situation applicable thereon, together with its historical background, I make the following statement:

Paragraph 4 of the complaint in this proceeding makes reference to Informal Complaint No. 174238. That complaint was filed with the Commission on April 9, 1946. It alleged simply that the rates and charges attacked therein were unjust and unreasonable in violation of Section 1 of the Act. An amendment to that complaint filed with the Commission on June 10, 1946, added a Section 4 allegation.

Item No. 1421 of Agent Curlett's Tariff I.C.C.-No. A-758 effective September 1, 1942, published a commodity rate of 37¢ per 100 lbs., subject to a carload minimum weight of 30,000 lbs., for application on iron or steel engine driving gear or steering gear parts, n.o.i.b.n. Supplement No. 54 to that tariff, effective July 1, 1946, increased that rate to 41¢ under authority of the report and order of the Commission in *Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695. Supplement No. 72 to that tariff, effective January 1, 1947, further increased that rate to 47¢ under authority of the report and order of the Commission on further hearing in that proceeding, 266 I.C.C. 537.

Item No. 3110 of Agent Greenly's Tariff I.C.C.-O.C. No. 60, effective December 2, 1943, published a Class 40 rating for application on iron or steel engine driving gear or steering gear parts, with a carload minimum weight of 24,000 lbs., subject to Rule 34.

Defendant's Exhibit "A."

Agent Curlett's Tariff I.C.C. No. A-766, in effect on April 9, 1944, published Class 40 rates of 42¢ per 100 lbs., for application from Syracuse, N. Y., to Detroit, Mich., East Syracuse, N. Y., to Detroit, Mich., and Syracuse, N. Y., to Dearborn, Mich. Supplement No. 42 to that tariff, effective July 1, 1946, increased those rates to 47¢, and Supplement No. 48 to that tariff, effective January 1, 1947, further increased those rates to 53¢, under authority of the reports and orders of the Commission in the proceedings heretofore cited. Supplement No. 59 to that tariff, effective August 22, 1947, further increased those Class 40 rates to 58¢ under authority of the second supplemental report of the Commission in *Class Rate Investigation, 1939*, 268 I.C.C. 577. This last increase in these class rates automatically eliminated the alleged Fourth Section violation.

That is the simple rate and tariff situation put in issue by this complaint.

Early in 1941 the New Process Gear Corporation asked this defendant to establish a 37¢ rate, with a carload minimum weight of 30,000 lbs., for application on this traffic. At that time the weight of their shipments usually ranged from the classification minimum weight of 24,000 lbs. to 60,000 lbs., and very often was considerably higher. We were assured that a number of motor carriers had been soliciting this business, and that the complainant was even negotiating with a truck builder for the construction of twelve specially fitted trucks in which these driving gear parts would be shipped from Syracuse to Detroit. We were also assured that if the truck movement materialized, they would haul castings and forgings from Detroit to Syracuse, thus giving them a payload in each direction. The complainant insisted that the 37¢ rate sought, with the suggested 30,000 lb. carload minimum weight, was absolutely essential if this traffic was to continue to move

by rail in the face of motor truck competition. After the investigation necessary to assure ourselves that compliance with that request was imperative if we were to retain the traffic for rail movement, the basic commodity rate of 37¢ per 100 lbs., subject to a carload minimum weight of 30,000 lbs., which was legally applicable on the shipments covered by this complaint, was published in Item No. 1421 of Supplement No. 32 to Agent Curlett's Tariff I.C.C. No. A-707, effective October 21, 1941.

Neither this complaint, nor the informal complaint referred to therein gives any indication of the number of shipments on which reparation is sought. Consequently, in order to ascertain the extent of the movement of this commodity from Syracuse, N. Y., to Detroit, Mich., as well as from East Syracuse, N. Y., to Detroit, Mich., and from Syracuse, N. Y., to Dearborn, Mich., I undertook an investigation. The results proved most enlightening and, in my opinion, justify the dismissal of the complaint forthwith.

I found that there was no production of engine driving gear or steering gear parts at East Syracuse, N. Y., and that there had been no shipments from that point to Detroit, Mich., via our line during the period covered by this complaint. I developed that the only automotive plant in Dearborn, Mich., is the River Rouge plant of the Ford Motor Company. The plant is located within the switching limits of Detroit, Mich., and any shipments forwarded from Syracuse, N. Y., via our line for delivery to that plant would have been lawfully subject to the application of Detroit rates.

From a check made of shipments forwarded from Syracuse to Detroit during the period from May 1 to May 23, 1946, I learned several additional facts which should prove conclusively that the legally applicable charges on the shipments covered by this complaint were not unjust, unreasonable, or otherwise unlawful.

That check disclosed that 58 shipments had been forwarded from Syracuse to Detroit during that period, 4 of which were rated as less-than-carload shipments. The average weight of the remaining 54 shipments rated as carloads was 28,787 lbs., on which minimum per car charges, based on the 37¢ rate and the 30,000 lb. carload minimum weight, were $111.00.

Of those 54 carload shipments, 30 were loaded well in excess of the applicable 30,000 lb. minimum weight. The weights of the 30 shipments ranged from 30,906 lbs. to 68,200 lbs., and averaged 35,483 lbs. Charges for those 30 shipments, based on the 37¢ rate and the average weight of the shipments of 35,483 lbs., would have been $131.29 per car. Had there been any similar shipments from East Syracuse, N. Y., to Detroit, Mich., or from Syracuse, N. Y., to Dearborn, Mich., (*) charges of $149.02 per car would have been legally applicable thereon. For purposes of that comparison, I have not bothered to see what effect, if any, the application of Rule 34 would have had in computing charges on the classification basis.

Of the remaining 24 carload shipments included in that check, 7 were loaded to a weight in excess of 26,460 lbs., their average weight being 28,320 lbs. Again disregarding the possible effect of Rule 34 on those charges, the minimum charges on the classification basis applied to that average weight would have been $118.94, as compared with the legally applicable minimum per car charge of $111.00.

That leaves but 17 shipments, or less than one-third of the total of 54 carload shipments forwarded during the check period, on which the complainant would be entitled to reparation. Stated differently, had the basis sought by this complaint been legally applicable, in lieu of the commodity rate and minimum weight under attack, consider-

(*) subject to Dearborn rates.

Defendant's Exhibit "A."

ably higher per car charges would have been legally applicable on 37 of the 54 shipments forwarded during the check period.

Had 54 similar shipments moved from East Syracuse, N. Y., to Detroit, Mich., or from Syracuse, N. Y., to Dearborn, Mich., (*) based on the average weight of 28,787 lbs. for the 54 carload shipments forwarded from Syracuse to Detroit during the check period, and disregarding the possible effect of Rule 34, they would have been lawfully subject to a charge of $120.91 per car, or $9.91 per car in excess of the minimum per car charge applicable on shipments from Syracuse, N. Y., to Detroit, Mich.

An investigation made subsequent to the filing of this complaint disclosed that the complainant had forwarded a number of cars with comparatively light loads. We were assured that those were "special cases" where consignees were in such urgent need of supplies that it was imperative that shipments be forwarded as quickly as possible and not held until heavier carloading could be accomplished. When cancellation of the commodity rate was suggested, the complainant insisted that it be continued in effect.

The movement check I have heretofore discussed disproves the correctness of that explanation. It showed several instances of shipments below the minimum weight on days on which other shipments in excess of the minimum weight were forwarded. For example, on May 9, 1946, five cars were shipped. The actual weight of one was 15,475 lbs., and of another 14,040 lbs. Both were tendered as carload shipments and billed at the applicable carload minimum weight of 30,000 lbs. Yet on the same day three other cars were loaded to weights of 37,320 lbs., 36,003 lbs., and 39,210 lbs., respectively.

(*) subject to Dearborn rates.

Defendant's Exhibit "A".

On May 20, 1946, the complainant made three carload shipments. The actual weight of one was 14,955 lbs.; it was billed at the minimum weight of 30,000 lbs. The other two shipments weighed 31,613 lbs. and 34,504 lbs., respectively.

On May 4, 1946, the complainant made five carload shipments. One weighed 14,510 lbs., another 28,152 lbs., and a third 28,968 lbs., respectively. Each was billed at the carload minimum weight of 30,000 lbs. The other two shipments forwarded that day weighed 31,518 lbs. and 31,790 lbs., respectively.

I could give several additional similar illustrations of the complainant's practice in that respect but it hardly seems necessary. The significant thing is that each shipment I have referred to was made by the complainant to a single consignee. That should be conclusive evidence that sufficient tonnage was readily available throughout the check period to have enabled the loading of all cars in excess of the minimum weight. I have no reason to believe that any different situation obtained at any time during the entire period covered by this complaint.

I do want to testify to one more fact. The complainant's memorandum of facts and argument includes a statement signed by one "M. Arahan". At my request our Syracuse were in daily contact with the complainant's offices for the best part of a week endeavoring to ascertain who Witness Arahan is and what his exact position and duties with the complainant actually are. We were advised by the complainant's representatives that no one of that name, or a similar one, is connected with the New Process Gear Corporation.

(Verified by Charles Coughlin on January 5, 1951.)

Defendant's Exhibit "A".

* * * * *

REPORT PROPOSED BY WOODROW A. SHRIVER, EXAMINER

The parties agreed to the disposition of this proceeding under the shortened procedure, thereby waiving oral hearing and cross examination, and this procedure was followed.

Complainant corporation alleges by complaint filed June 8, 1950, that the rate[1] charged on numerous carload shipments of automobile driving gear parts, iron or steel, moved over defendant's lines from Syracuse, N. Y., through Suspension Bridge, N. Y., to Detroit, Mich., between April 9, 1944, and August 21, 1947, was unreasonable in violation of section 1 and unlawful in violation of section 4 of the Interstate Commerce Act. The Commission is asked to award reparation. An informal complaint covering shipments within the statutory period and pendente lite and alleging unreasonableness was filed April 9, 1946. An amendment alleging the section 4 violation was filed June 10, 1946. The complaint not being susceptible to informal adjustment, was closed April 11, 1950. Claims based on the alleged fourth-section departure and covering shipments delivered or tendered for delivery prior to June 10, 1944, are barred.

It is contended by the defendants that the Commission cannot consider the complaint without first determining the scope of Abner Pollack's authority to act as agent for the complainant. Both the informal and formal complaints were signed by A. E. Woonton, treasurer of complainant, and counter-signed by Abner Pollack as practitioner. The rule followed by the Federal courts is that an appearance in court of a licensed attorney creates a presumption that he has authority to act, and the law casts the burden of prov-

[1] Rates herein are stated in cents per 100 pounds.

ing the contrary on those asserting it. See *Bowles* v. *American Brewery*, 146 Fed. (2d) 842, 847, and *Bonnifield* v. *Thorpe*, 71 Fed. 924, 927, and *Standard Cap & Seal Corp.* v. *Delaware, L. & W. R. Co.*, 274 I. C. C. 357. The defendants herein presented no evidence indicating that Pollack did not have authority to represent the complainants, thus the presumption is that he had authority to do whatever might be necessary to lawfully prosecute the complaint to a conclusion.

The rates charged and collected on the driving gear parts were commodity rates ranging from 37 cents to 46 cents, minimum 30,000 pounds. These gear parts are rated class 40, minimum 24,000 pounds, subject to rule 34, in the Official Freight Classification. That basis was voluntarily established by the carriers and has been in effect many years. Cars measuring 40 feet 7 inches were used.

On April 9, 1944, there was in effect in Agent Curlett's Tariff I. C. C. No. A-758, a commodity rate of 37 cents, minimum 30,000 pounds, on iron or steel driving gear or steering gear parts, n.o.i.b.n.,[2] from Syracuse to Detroit. On July 1, 1946, that rate was increased to 41 cents, and on January 1, 1947, the rate was further increased to 46 cents.

Agent Curlett's Tariff I. C. C. No. A-766, in effect on April 9, 1944, published a class 40 rate of 42 cents, for application from Syracuse to Detroit, from East Syracuse, N. Y., to Detroit, and from Syracuse to Dearborn, Mich. On July 1, 1946, that rate was increased to 47 cents, and on January 1, 1947, it was further increased to 53 cents. On August 22, 1947, the rate was further increased to 58 cents under authority of the second supplemental report of the Commission in *Class Rate Investigation, 1939*, 268 I. C. C. 577. This last increase eliminated the rate situation that formed the basis of this complaint.

[2] Not otherwise indexed by name.

Defendant's Exhibit "A".

While the commodity rate,[1] shown in the above rate history, does not in itself exceed the corresponding class rate, the commodity rate in combination with the minimum of 30,000 pounds resulted in higher charges than the class rate with the 24,000-pound minimum on shipments weighing less than 26,450 pounds. It is the complainant's contention, therefore, that the commodity rate is unreasonable when applied to its shipments weighing less than 26,450 pounds. Complainant's shipments in excess of that weight are not in issue here since obviously the commodity rate would result in a lower per-car charge.

The complainant does not contend that the commodity rate and higher minimum is in itself unreasonable. On the contrary the evidence indicates that the charges on complainant's total shipments would have been much higher in the absence of the commodity rate. The complainant points out that the rate situation assailed could have been corrected easily by providing for alternation of the 37-cent commodity rate, minimum 30,000 pounds, with the 42-cent class rate at the 24,000-pound minimum in connection with cars 40 feet 7 inches or less in length. In *Goodman Mfg. Co.* v. *Pittsburgh, C., C., & St. L. Ry. Co.*, 21 I. C. C. 95, the Commission said: "No requirement is upon the carriers to so construct their tariffs and the failure to do so in this case raises no presumption that the charge assessed under the commodity rate and minimum was unreasonable because in excess of the charge which would have accrued under the class rate applied to the minimum weight prescribed by the Illinois classification".

The contemporaneous class 40 rate on corresponding traffic from Syracuse to Dearborn and from East Syracuse to Detroit was 42 cents, minimum 24,000 pounds. On ship-

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[1] The rates referred to hereinafter will be those in effect prior to July 1, 1946, namely, the base commodity rate of 37 cents, and the base class rate of 42 cents.

ments weighing 26,450 pounds or less, this rate resulted in a lower per-car charge than the assailed rate and minimum from Syracuse to Detroit. Since Detroit is directly intermediate to Dearborn and Syracuse is directly intermediate to East Syracuse, both an origin and destination fourth-section departure resulted. The Supreme Court in *Davis* v. *Portland Seed Co.*, 264 U. S. 403, held that *a fourth-section departure does not afford an adequate basis for reparation where there is no other proof of damage.* In the instant proceeding, it is apparent that if the class rate were applied to all the shipments made by the complainant the resulting cost would far exceed that paid under the applicable rate. The complainant, in asking for reparation, in effect seeks an alternating rate. In *Prentiss Wabers Products Co.* v. *Chicago & N. W. Ry. Co.*, 219 I. C. C. 473, the Commission found that establishment of alternative bases on iron and steel articles is generally undesirable and not in the public interest.

In view of the recommended findings it is deemed unnecessary to consider defendant's objection to the competency of complainant's witness.

The Commission should find that the rates charged have not been shown to have been unreasonable; and that there is no proof of damage due to the fourth-section departure which was subsequently removed. The complaint should be dismissed.

Defendant's Exhibit "A".

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS PATERSON, JOHNSON, AND CROSS BY DIVISION 3:

The parties agreed to the disposition of this proceeding under the shortened procedure, thereby waiving oral hearing and cross-examination, and this procedure was followed. The complainant filed exceptions to the report proposed by the examiner. Our conclusions differ from those recommended by him. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant alleges, by complaint filed June 8, 1950, that the rates[1] charged on numerous carload shipments of automobile driving gear parts, iron or steel, moved over the defendant's lines from Syracuse, N. Y., through Suspension Bridge, N. Y., to Detroit, Mich., on and between April 9, 1944 and August 21, 1947, were unreasonable and also in violation of section 4 of the Interstate Commerce Act. We are asked to award reparation. An informal complaint covering shipments within the statutory period and pendente lite, and alleging unreasonableness, was filed on April 9, 1946. An amendment alleging the section 4 departure was filed on June 10, 1946. That complaint, not being susceptible to informal adjustment, was closed on April 11, 1950.

The defendant contends that we may not consider the complaint without first determining the scope of Abner Pollack's authority to act as agent for the complainant. Both the informal and the formal complaints were signed by A. E. Woonton, treasurer of the complainant, and countersigned by Abner Pollack as practitioner. The rule

[1] Rates herein are stated in cents per 100 pounds.

generally followed by the courts is that an appearance in court of a licensed attorney creates a presumption that he has authority to act, and the law casts the burden of rebutting that presumption upon those asserting that he lacks authority. *Standard Cap & Seal Corp.* v. *Delaware, L. & W. R. Co.*, 274 I.C.C. 357, and cases cited therein. In the absence of any evidence to the contrary, we conclude that Pollack's authority was adequate.

The competency of the complainant's witness, William Graham, is also questioned by the defendant because of difficulty in identifying the witness from his signature, and because the complainant allegedly did not properly qualify him as an expert. The first point made is technical and lacks substance. The identification of the witness as sales manager and traffic manager of the complainant for the past 10 years is sufficient to establish his competency as a witness in the proceeding.

On April 9, 1944, a commodity rate of 37 cents, minimum 30,000 pounds, was applicable on iron or steel driving-gear or steering-gear parts from Syracuse to Detroit. This rate was increased to 41 cents on July 1, 1946, and further increased to 46 cents on January 1, 1947. These rates were collected on the complainant's shipments, on which it paid and bore the charges. These gear parts are rated class 40, minimum 24,000 pounds, subject to rule 34, in the official classification. On the dates above indicated, the class-40 rates between Syracuse and Detroit were 42 cents, 47 cents, and 53 cents, respectively. The shipments were loaded in cars not exceeding 40 feet 7 inches in length.

There were no provisions for the alternative application of the class and the commodity rates. Although the commodity rates did not in themselves exceed the corresponding class rates, in combination with the minimum of 30,000 pounds they resulted in higher charges than the class rates on shipments weighing approximately 26,000 pounds or

less. On August 22, 1947, the class rate of 53 cents was further increased to 58 cents pursuant to the second supplemental report in *Class Rate Investigation, 1939*, 268 I.C.C. 577. This increased class rate resulted in higher charges on 24,000-pound shipments than were produced by the commodity rate of 46 cents, minimum 30,000 pounds, and eliminated the rate situation which formed the basis of the section 4 allegation.

The contemporaneous class-40 rates on corresponding traffic from Syracuse to Dearborn, Mich., and from East Syracuse, N. Y., to Detroit were the same as those from Syracuse to Detroit. On shipments weighing approximately 26,000 pounds or less, these rates resulted in lower charges per car than the assailed rates and minimum from Syracuse to Detroit. Since Detroit is directly intermediate to Dearborn, and Syracuse is directly intermediate to East Syracuse, both an origin and a destination fourth-section departure resulted. The defendant states that there were no movements of gear parts from East Syracuse to Detroit between April 9, 1944 and August 21, 1947, and that the only automotive industry on its lines in Dearborn is within the switching limits of Detroit. It contends, therefore, that no fourth-section departure occurred. A fourth-section departure results where a carrier publishes a lower rate for a longer haul than for a shorter haul over the same route in the same direction without permission of the Commission. *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 424. Moreover, unauthorized departures from the long-and-short-haul provision of section 4 raise a presumption of unreasonableness, and removal of the departures does not rebut this presumption. *McPhillips Mfg. Co.* v. *Gulf, M. & N. R. Co.*, 167 I.C.C. 207, 209.

A class rate based on the rating of a commodity in the governing classification is ordinarily the highest rate that may be deemed reasonable for that commodity. *E. I. Du*

Defendant's Exhibit "A".

Post de Nemours & Co. v. Chicago, N. S. & M. R. Co., 258 I.C.C. 789, 794. A carload minimum weight must be considered as a part of a carload rate, and where the minimum weight in connection with a commodity rate results in higher charges than under a class rate with a lower minimum, there is a presumption of unreasonableness requiring special justification. *Butts Fruit & Produce Co. v. Northern Pac. Ry. Co.*, 178 I.C.C. 370; *Butler Bros. v. Ann Arbor R. Co.*, 253 I.C.C. 437.

The defendant submits that the complainant requested or agreed to the establishment of the 30,000-pound commodity rate prior to its publication. Prior agreement, however, is not determinative of the just, reasonable, and nondiscriminatory character of a rate. See *Lash' & Co. v. Gould Southwestern Ry. Co.*, 26 I.C.C. 179, 182.

Fifty-four carload shipments of gear parts were forwarded from Syracuse to Detroit between May 1 and May 23, 1946. Of these, according to the defendant, 30 shipments weighed in excess of 30,000 pounds, the average being 35,483 pounds per car. Based on the average weight, the commodity rate of 37 cents produced average charges of $131.29 per car, whereas the class rate of 42 cents would have produced an average of $149.02 per car. Of the remaining 24 shipments, 7 were loaded in excess of 26,450 pounds, their average weight being 28,320 pounds. Using the minimum weight of 30,000 pounds, the average charges on the 7 carloads were $111 per car, whereas the class rate of 42 cents at the actual average weight would have produced $118.94 per car. Contrary to argument of the defendant, this does not necessarily indicate that the charges on the remaining 17 carloads in this period, which weighed less than 26,450 pounds, were reasonable. Neither does it appear that the foregoing period selected by the defendant is representative of the entire period. A total of more than 600 carloads is in issue, and the number of the ship-

ments which weighed less than 26,450 pounds was greater in 1944 and 1945 than in 1946.

The applicable rates are alleged to have been unreasonable also because of higher charges resulting from the westbound rates than those applicable to eastbound shipments. Generally, the charges on a shipment in one direction should be the same for the reverse direction where the circumstances of transportation are substantially the same, and while unreasonableness is not conclusively proven where substantial differences in charges occur, a satisfactory explanation is required. *Davies v. Railway Exp. Agency, Inc.* 263 I.C.C. 635; *Zenith Dredge Co. v. Northern Pac. Ry. Co.*, 263 I.C.C. 59. No explanation was attempted as to why a shipment weighing less than 26,000 pounds could have been transported from Detroit to Syracuse at a lesser charge than in the reverse direction.

The defendant has failed to overcome the prima facie case made by the complainant on the basis of three separate presumptions of unreasonableness of the rates in dispute.

We find that the charges assailed were unreasonable to the extent that they exceeded those which would have accrued at the corresponding class 40 rates subject to the minimum of 24,000 pounds. We further find that the complainant made the shipments, and paid and bore the charges thereon; that it was damaged thereby, and is entitled to reparation in the amount of the difference between the charges paid and those which would have accrued on the basis herein found reasonable, with interest.

The complainant should comply with rule 100 of the General Rules of Practice.

By the Commission, division 3.

W. P. Bartel,
Secretary.

(Seal.)

Defendant's Exhibit "A"

PETITION FOR LEAVE TO FILE A PETITION SEEKING THE REOPENING, RECONSIDERATION AND, IF NECESSARY, A FURTHER HEARING, AND FOR VACATION OR MODIFICATION OF THE OUTSTANDING ORDER OF THE COMMISSION THEREIN.

Comes now the defendant in this proceeding, hereinafter sometimes referred to as the petitioner, and prays leave to file the attached petition seeking the reopening, reconsideration and, if necessary, further hearing of this proceeding, and the vacation or modification of the outstanding order of the Commission therein.

The reopening of the proceeding would put in issue the rates and charges assailed, and those found reasonable in the report of the Commission, by Division 3, decided August 8, 1951.

Your petitioner believes that the decision of the Commission, by Division 3, was so in error as to matters of fact and of law as to require the reopening of the proceeding as a matter of equity for reconsideration and determination based on the actual facts and the law.

To prove the depressed nature of the assailed rate basis and its over-all reasonableness, the defendant put in evidence as representative of the complainant's shipments from Syracuse, N. Y., to Detroit, Mich., the results of a check made during the period from May 1 to May 26, 1946. Without discussing that evidence in detail, the report proposed by Examiner Shriver stated (sheet 2) that "the evidence indicates that the charges on complainant's total shipments would have been much higher in the absence of the commodity rate." The report by Division 3 in effect summarily dismissed that evidence on the ground that it does not appear that the "period selected by the defendant is representative of the entire period", there being more than 600 carloads on which the complainant sought reparation.

Defendant's Exhibit "A".

Following the receipt of the report of the Commission by Division 3, the defendant undertook a check of every shipment made by the complainant from Syracuse to Detroit to confirm the fact that the period and results shown by its evidence were in fact representative. That check was not only a very costly one to the defendant but necessarily a slow and tedious undertaking.

Appendix A of the petition attached hereto is a statement covering 1,710 additional carload shipments made by the complainant from Syracuse to Detroit on which the defendant would have collected over $33,000 in additional revenue had class 40 rates been legally applicable throughout the complaint period. Those are the rates which the report by Division 3 finds reasonable during the complaint period and on which it has awarded reparation approximating $5,000 on 600 cars loaded more than ten percent below the applicable minimum weight.

Defendant cannot believe that the Commission, or Division 3 thereof, would hold a rate basis reasonable for the purpose of awarding reparation on some 600 cars notwithstanding the fact that it would have resulted in the assessment of more than $33,000 in additional revenue on 1,710 other shipments made by the complainant from Syracuse to Detroit during the same period and identical in every respect to those involved in that complaint except that they exceeded the low weight of approximately 26,000 pounds necessary to create technical fourth section departures. If the assailed basis was reasonable as to the 1,710 shipments on which the class 40 rates would have resulted in greatly increased freight charges, it must in all equity be held reasonable as to 600 other shipments which the complainant knowingly loaded more than ten percent below the applicable minimum weight.

Wherefore, in accordance with the provisions of Rules 101 and 102 of the General Rules of Practice, petitioner

respectfully prays leave to file the attached petition seeking the reopening, reconsideration and, if necessary, a further hearing of said proceeding.

Respectfully submitted,

J. EDGAR McDONALD,
Attorney for Petitioner.

466 Lexington Avenue,
New York 17, N. Y.

DEFENDANT'S PETITION FOR REOPENING, RECONSIDERATION AND, IF NECESSARY, A FURTHER HEARING, AND FOR VACATION OR MODIFICATION OF THE OUTSTANDING ORDER OF THE COMMISSION THEREIN.

Comes now the defendant in this proceeding, sometimes hereinafter referred to as petitioner, and respectfully prays that this proceeding be reopened for reconsideration, and, if necessary, for further hearing.

In support of this prayer, petitioner respectfully shows:

I.

RESUME OF PROCEEDING.

By complaint filed on June 8, 1950, the complainant assailed the rates and charges assessed on carloads of automobile driving gear parts, iron or steel, shipped from Syracuse, N. Y., to Detroit, Mich., during the period from April 9, 1944, to August 21, 1947. It was alleged that the assailed rates were unjust and unreasonable, in violation of Sections 1 and 4 of the Interstate Commerce Act. The prayer of the complaint was for an award of reparation.

Defendant's Exhibit "A".

The complaint was handled under shortened procedure and a proposed report was issued by Examiner Woodrow A. Shriver, recommending that the Commission find the rates charged had not been shown to have been unreasonable, that there was no proof of damage due to the fourth section departure alleged, and that the complaint should be dismissed.

In the report of the Commission by Division 3, *New Process Gear Corp.* v. *New York Central R. Co.*, 281 I. C. C. 701, the assailed rates were found to have been unreasonable to the extent that they exceeded those which would have accrued at the corresponding class 40 rates, subject to the minimum weight of 24,000 pounds, and reparation awarded.

II.

THE DECISION IS IN ERROR AS TO MATTERS OF FACT AND OF LAW.

The report of the Commission, reversing Examiner Shriver's proposed report, is based on the conclusion (p. 704) that the defendant failed to overcome the *prima facie* case made by the complainant on the basis of three separate presumptions of unreasonableness of the assailed rates.

A. *The First Presumption.*

The first presumption which the report concludes the defendant did not overcome is the presumption of unreasonableness attaching to an unauthorized departure from the long-and-short haul provision of section 4.

As the report states (p. 702) on April 9, 1944, a commodity rate of 37 cents, subject to a carload minimum weight of 30,000 pounds, was applicable from Syracuse,

N. Y., to Detroit, Mich., on the commodity involved in this complaint. On July 1, 1946, that rate was increased to 41 cents, and on January 1, 1947, to 46 cents per 100 pounds. At the time these shipments moved a class 40 rating, subject to a carload minimumu weight of 24,000 pounds and to Rule 34, published in the Official Classification, applied on these gear parts. On the dates referred to the class 40 rates from Syracuse to Detroit were 42, 47 and 53 cents, respectively.

The commodity rates were in each instance lower than the concurrently applicable class 40 rates. However, on shipments weighing approximately 26,000 pounds or less, the 30,000-pound carload minimum weight which governed the application of the commodity rate resulted in higher per-car charges than would have resulted from the application of the class rates subject to the 24,000-pound minimum weight.

The fourth section departure resulted from the fact that commodity rates were not published for application on this traffic from East Syracuse, N. Y., to Detroit, Mich., or from Syracuse, N. Y., to Dearborn, Mich., Syracuse being intermediate from East Syracuse in the first instance, and Detroit being intermediate to Dearborn in the latter. The class rates applicable from East Syracuse to Detroit and from Syracuse to Dearborn were the same as those applicable from Syracuse to Detroit. The record proves conclusively that the applicable commodity rates were substantially depressed rates, published to meet motor truck competition, establishment of which was essential if the defendant was to hold not only this particular traffic to its rails, but castings and forgings moving from Detroit to Syracuse.

The record proves conclusively that there was no movement of automobile gear parts from East Syracuse to Detroit or from Syracuse to Dearborn, Mich. The depar-

tures alleged, therefore, were nothing more than paper departures, and the defendant's breach of section 4 was purely technical and in no case substantial.

As long ago as 1907, in *Mo. & Kans. Shippers' Association* v. *M., K. & T. Ry. Co.*, 12 I. C. C. Rep. 483, the Commission refused to award reparation in such situations, stating:

> "Although it is clear that the Class C rate was a paper rate only, so far as hay was concerned, and that the breach by defendant of the provisions of section 4 was therefore purely technical and in no sense substantial, the object of this petition is to take advantage of the situation and to secure reparation on shipments that moved to Kansas City while the defendant inadvertently permitted its tariffs to remain in that condition." (p. 484)

Similar conclusions were made in *Knoxville Freight Bureau* v. *Southern Ry. Co.*, 156 I. C. C. 315, 319; *McClamrock Co.* v. *Atlantic & Y. Ry. Co.*, 178 I. C. C. 445, 447-8; *A. L. Shafton & Co.* v. *Chicago, B. & Q. R. Co.*, 197 I. C. C. 279, 281 (citing *Waverly Paper Board Co.* v. *Boston & M. R.*, 148 I. C. C. 269; *Winona Oil Co.* v. *Atchison, T. & S. F. Ry. Co.*, 163 I. C. C. 51) and *Warner Chemical Co.* v. *Baltimore & O. R. Co.*, 204 I. C. C. 581, 584.

In the light of all the facts of record in this proceeding, the most that can properly be said here is that as to some carloads shipped by the complainant from Syracuse to Detroit there was a technical fourth section departure which was in no sense substantial. On all the facts of record the applicable rates cannot be said to have been unjust or unreasonable. It was error to conclude that the defendant had not overcome the first presumption of unreasonableness. That is particularly true in a case where the only real issue is the complainant's right to an award of

reparation. As Examiner Shriver pointed out in his proposed report, the Supreme Court has held that a fourth section departure does not afford an adequate basis for an award of reparation where there is no other proof of damage. *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 424.

B. *The Second Presumption.*

The second presumption which the report concludes the defendant did not overcome is the presumption of unreasonableness where the minimum weight in connection with a commodity rate results in higher charges than under a class rate with a lower minimum weight.

It should be noted and kept in mind that, as the Commission stated in *Florida Railroad Commrs.* v. *Aberdeen & R. R. Co.*, 177 I.C.C. 735, "*the rule is one which is often recognized but it is not a statement of principle and we do not apply it without analysis of the special situation in which it is involved.*" (Italics added.)

As the record proves conclusively, and as has already been pointed out, the commodity rate here involved was a substantially depressed rate, the establishment of which was made necessary to hold not only this particular traffic to the defendants' rails but also to retain other traffic moving in the reverse direction from Detroit to Syracuse.

Contrary to the statement in the report (p. 703), the defendant does not contend that the complainant "agreed" to the establishment of the 30,000-pound commodity rate prior to its establishment. As the record proves conclusively the complainant in effect served notice upon the defendant that unless a 37-cent commodity rate was published to apply on this traffic from Syracuse to Detroit in lieu of the then applicable class 40 rate of 42 cents, this particular traffic, along with other traffic from Detroit to Syracuse, would be diverted from rail to truck movement.

Defendant's Exhibit "A".

During the period from April 9, 1944, to June 30, 1946, the minimum per car charge (30,000 pounds at 37 cents) was $111. During that period a shipment weighing 26,431 pounds, if charged at the concurrently applicable class 40 rate of 42 cents, would have produced exactly the same per car charge. In other words, to create technical fourth section departures during the period referred to, carload shipments had to weigh less than 26,431 pounds.

From July 1, 1946, to January 1, 1947, carload shipments had to weigh less than 26,171 pounds to create technical fourth section departures. From January 1, 1947, to August 22, 1947, carload shipments had to weigh less than 26,039 pounds to create technical fourth section departures.

In order to prove that the assailed basis was not unreasonable, and that the charges on the complainant's total shipments would have been much higher had the sought basis applied to all the complainant's shipments throughout the complaint period, the defendant submitted the results of a check of shipments made during the period from May 1 to May 23, 1946, as representative of the entire period covered by the complaint. Without discussing that evidence in detail, Examiner Shriver's proposed report stated (sheet 2) that "the evidence indicates that the charges on complainant's total shipments would have been much higher in the absence of the commodity rate." The report by Division 3 in effect summarily dismisses that evidence on the ground that it does not appear that the "period selected by the defendant is representative of the entire period", there being more than 600 carloads on which the complainant sought reparation.

Attached hereto and made a part hereof as Appendix "A" is a statement covering 1,710 carload shipments other than those on which reparation is sought which were shipped by the complainant from Syracuse, N. Y., to Detroit, Mich., during the reparation period, on which no

reparation would accrue but on which the defendant would have collected $33,177.91 in additional revenue had the class 40 rates been applicable on this traffic throughout the reparation period. In other words, the defendant would have received more than $28,000 as additional net revenue had the class 40 rates which Division 3 finds reasonable for the entire complaint period and on which it has awarded approximately $5,000 as reparation on 600 cars been in effect throughout the entire complaint period and applied on all the complainant's shipments of automobile driving gear parts from Syracuse, N. Y., to Detroit, Mich.

As the proposed report of Examiner Shriver pointed out (sheet 3), the complainant's request for reparation in effect seeks an alternate rate although the Commission in *Prentiss Wabers Products Co.* v. *Chicago & N. W. Ry. Co.*, 219 I.C.C. 473, found that the establishment of alternative bases of rates on iron and steel articles is generally undesirable and not in the public interest.

Examiner Shriver's proposed report also pointed out that as long ago as 1911 the Commission found, in *Goodman Mfg. Co.* v. *Pittsburg, C. C. & St. L. Ry. Co.*, 21 I.C.C. Rep. 95, that failure to establish an alternative class or commodity rate basis raised no presumption that the charges assessed under the commodity rate and minimum weight were unreasonable because they exceed the charge which would have accrued under the class rate and minimum weight applicable in connection therewith.

On the facts of record the Commission should have concluded that the defendant did overcome the second presumption of unreasonableness referred to in the report by Division 3.

The following are but a few of the large number of cases which support the validity of the defendant's contentions with respect to this particular presumption: *Aetna Explosives Co.* v. *S.A.L. Ry. Co.*, 51 I.C.C. 674, 675-6; *Bluefield Produce & Provision Co.* v. *Atlantic Coast Line R. Co.*,

159 I.C.C. 261, 262; *American Sum. Tobacco Corp.* v. *Atlantic Coast Line R. Co.*, 171 I.C.C. 796, 798; *Adamston Flat Glass Co.* v. *Baltimore & O. R. Co.*, 181 I.C.C. 635, 637-8; *Standard Paper Mfg. Co., Inc.* v. *Baltimore & O. R. Co.*, 200 I.C.C. 547, 549; *S. A. Gerrard Co.* v. *Alton R. Co.*, 209 I.C.C. 270, 272; *Weyl-Zuckerman & Co.* v. *Alabama T. & N. R. Corp.*, 210 I.C.C. 565, 569; *J. Allen Smith & Co., Inc.* v. *Southern Ry. Co.*, 214 I.C.C. 371, 376; *National Gas Products Assn* v. *Akron, C. & Y. Ry. Co.*, 232 I.C.C. 619, 629; *St. Paul Scrap Iron & Metal Co.* v. *Akron, C. & Y. Ry. Co.*, 238 I.C.C. 519, 520; *C. Findeiss Sons Co.* v. *Pennsylvania R. Co.*, 241 I.C.C. 299, 300.

C. *The Third Presumption*

The third presumption which the report states the defendant did not overcome is that generally the charges on a shipment in one direction should be the same for the reverse direction where the circumstances of transportation are substantially the same, and while unreasonableness is not conclusively proven where substantial differences in charges occur, a satisfactory explanation is required.

The report states (p. 704) that no explanation was attempted as to why a shipment weighing less than 26,000 pounds could have been transported from Detroit to Syracuse at a lesser charge than in the reverse direction.

That statement completely loses sight of three important facts of record. In the first place, it has been conclusively proven that the assailed rate is a depressed rate made to meet motor truck competition. In the second place, there is no evidence in the record of the existence of any motor truck competition necessitating a reduction in the eastbound rate. In the third place, there is no evidence in the record of a single shipment ever having moved from Detroit

to Syracuse. As a matter of fact, no substantial difference in charge would have accrued on a carload shipment from Detroit to Syracuse.

In *Blanton Duncan* v. *A.T. & S.F. R.R. Co., et al.*, 6 I.C.C. Rep. 85, decided November 3, 1893, the Commission, speaking of the different rates in opposite directions said:

> "* * * The two rates have no necessary connection or relation, and the fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does not, as in case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate." (p. 103)

In *Weil* v. *Pennsylvania R. Co., et al.*, 11 I.C.C. Rep. 627, the Commission said:

> "While the law requires all rates to be reasonable and just, and forbids unreasonable discriminations, it does not prescribe any measure or test of reasonableness in either case. It is manifest that the reasonableness of every rate or discrimination called into question must be determined and measured by the circumstances and conditions affecting the business. The potency of any particular fact, circumstance, or condition in a given case is to such an extent dependent upon or modified by others, so that that which is of great importance in one case may be of minor consequence in another. It follows that it can not be required in reason that rates must in all cases be the same in both directions between the same points any more than they can be made on a strictly uniform mileage basis." (pp. 629-630)

Defendant's Exhibit "A".

The Commission has repeatedly held that the mere fact that the rate in one direction exceeds the rate between the same points in the opposite direction is not a controlling test of the reasonableness of the higher rate. *Hull Vehicle Co.* v. *Southern Ry. Co. et al.*, 28 I.C.C. 619, 620; *Ellanovits* v. *Wheeling & L. E. Ry. Co.*, 209 I.C.C. 203, 204.

The following cited cases are but a few of the many more which support defendant's contention with respect to this presumption: *Standard Oil Co.* v. *Beaumont S.L. & W. Ry. Co.*, 178 I.C.C. 347; *Roxbury Iron & Metal Co., Inc.* v. *New York, N.H. & H. R. Co.*, 195 I.C.C. 332, 334; *California Fruit Wrapping Mills, Inc.* v. *G.N. Ry. Co.*, 200 I.C.C. 537; *Hausman Steel Co.* v. *Erie R. Co.*, 204 I.C.C. 13, 14; *J. C. Penney Co., Inc.* v. *Alabama G. S. R. Co.*, 206 I.C.C. 115, 119; *McGarrity* v. *Baltimore & O. R. Co.*, 208 I.C.C. 231, 235; *Winchester Repeating Arms Co.* v. *Chicago & N. W. Ry. Co.*, 220 I.C.C. 415, 416.

III.

CONCLUSION AND REQUESTED FINDINGS

The complaint involves past shipments only and the claim for reparation rests largely, if not entirely, on the fourth section departures alleged in the complaint. The record shows that technical fourth section departures existed. However, it proves conclusively that, as a practical matter, such departures existed only in the case of a minor portion of the complainant's total shipments. Those were occasioned by the action of the complainant in loading those shipments far below the applicable carload minimum weight, with the result that the minimum per-car charges under the applicable commodity rates and 30,000 pound carload minimum weight slightly exceeded

those which would have accrued based on the concurrently applicable class 40 rates subject to a 24,000-pound carload minimum weight.

In *Bluefield Produce & Provision Co.* case, *supra*, a substantially similar case, the Commission, noting the "extent" of the fourth section departure there involved found that no damage had been shown to have resulted, that the rate assailed was not unreasonable, and dismissed the complaint.

The record here before the Commission proves conclusively that the assailed rates were materially depressed rates established to meet motor truck competition, and necessary to retain not only this particular traffic but also other traffic moving in the reverse direction for rail movement. The record proves conclusively that substantially higher charges would have accrued on the complainant's total shipments in the absence of the assailed rates. In addition there is no proof of damage resulting from the extent to which the assailed rates constituted fourth section departures. The basis for an award of damages by the Commission must be as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another. *Schlicher* v. *Director General*, 62 I.C.C. 181, 185.

On the record before it in this proceeding the Commission is requested to find upon reconsideration that no different conclusion is warranted in this proceeding from that made in the *Bluefield Produce & Provision Co.* case, *supra*, that the prior report by Division 3 must be reversed, the complaint dismissed and the outstanding order awarding reparation vacated and set aside.

Defendant's Exhibit "A".

IV.

Further Hearing.

Petitioner believes that the facts hereinbefore set forth fully justify a reversal of the report of the Commission by Division 3, decided August 8, 1951, without further hearing. However, if the Commission is not persuaded that such is the fact, upon further consideration of the record in this proceeding in the light of the arguments advanced herein, then petitioner respectfully asks that the proceeding be assigned for further hearing. In that event, petitioner will offer detailed evidence concerning the 1,710 shipments included in Appendix "A" hereof.

Wherefore, petitioner prays that the Commission reopen this proceeding for reconsideration and, if necessary, further hearing, and for the vacation or modification of its outstanding order so as to accord with the facts and the law.

Respectfully submitted,

J. Edgar McDonald,
Attorney for Defendant.

466 Lexington Avenue,
New York 17, N. Y.

APPENDIX "A"

	Assailed Commodity Rate Basis				Class Rate Basis Found Reasonable			
Year	No. of Shipments	Weight	Rate	Freight	Weight	Rate	Freight	Additional Revenue
1944	36	1,080,000(1)	$ .37	$ 3,996.00	1,027,650	$ .42	$ 4,316.13	$ 320.13
1944	212	7,388,931	.37	27,339.04	7,388,931	.42	31,033.51	3,694.47
1945	114	3,420,000(1)	.37	12,654.00	3,227,143	.42	13,554.00	900.00
1945	257	8,675,901	.37	32,100.83	8,675,901	.42	36,438.78	4,337.95
1/1—)	64	1,920,000(1)	.37	7,104.00	1,810,445	.42	7,603.87	499.87
6/30/46)	229	8,193,386	.37	30,315.53	8,193,386	.42	34,412.21	4,096.68
7/1—)								
12/31/46)	45	1,350,000(2)	.41	5,535.00	1,279,850	.47	6,015.30	480.30
)	272	10,815,776	.41	44,344.68	10,815,376	.47	50,834.15	6,489.47
1/1—)	54	1,620,000(3)	.46	7,452.00	1,551,678	.53	8,223.89	771.89
8/21/47)	427	16,553,074	.46	76,144.14	16,553,074	.53	87,731.29	11,587.15
	1,710	61,017,068		$246,985.22	60,523,434		$280,163.13	$33,177.91

Notes:

(1)—26,431 to 30,000 pounds as 30,000 pounds
(2)—26,171 to 30,000 " " 30,000 "
(3)—26,039 to 30,000 " " 30,000 "

Defendant's Exhibit "A".

Defendant's Exhibit "A".

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 17th day of May, A. D. 1954.

No. 30599

NEW PROCESS GEAR CORPORATION

v.

NEW YORK CENTRAL RAILROAD COMPANY

Upon consideration of the record in the above-entitled proceeding, petition of defendants for reconsideration (and further hearing if necessary) and modification of the order, and of complainant's reply to the petition; and it appearing that the petition does not show substantial and material reasons for granting the same:

It is ordered, That the said petition of defendants be, and it is hereby, denied.

By the Commission.

GEORGE W. LAIRD,
Secretary.

Defendant's Exhibit "A".

PETITION SEEKING REOPENING AND RECONSIDERATION

Had the rates found reasonable by Division 3 in its report of August 8, 1951, 281 I.C.C. 701, for application on 638 carload shipments of automobile driving gear parts been legally applicable on all 2,348 carloads shipped by the complainant from Syracuse, N. Y., to Detroit, Mich., during the complaint period, the complainant would have paid $26,627.10 in additional freight charges.

That simple fact alone shoul make clear the complete lack of justice in the conclusion of Division 3 that reparation should be awarded on 638 of those shipments.

Just and equitable administration of the Act demands that any rate found reasonable for application on 638 carload shipments of automobile driving gear parts from Syracuse, N. Y. to Detroit, Mich., during the period from April 9, 1944 to August 21, 1947 must, in the absence of a finding of a dual or multiple basis of reasonable rates, be found equally reasonable with respect to the 1,710 other carload shipments of automobile driving gear parts shipped by the complainant from the same origin to the same destination during the same period.

WHEREFORE, in an effort to avoid court litigation as a result of the decision of Division 3 in this proceeding, defendant respectfully prays that it be reopened for reconsideration, that the finding by Division 3 that the assailed rates and charges were unjust and unreasonable as to 638 carload shipments out of a total of 2,348 carload shipments be reversed, that the award of reparation to the complainant be rescinded, and that the complaint be dismissed.

Respectfully submitted,

J. EDGAR MCDONALD,
Attorney for Defendant.

466 Lexington Avenue,
New York 17, N. Y.

* * * * * *

Defendant's Exhibit "A".

ORDER

At a General Session of the Interestate Commerce Commission, held at its office in Washington, D. C., on the 7th day of February, A. D., 1955.

No. 30599

NEW PROCESS GEAR CORPORATION

v.

NEW YORK CENTRAL RAILROAD COMPANY

Upon consideration of the record in the above-entitled proceeding, petition of defendant for leave to file another petition, submitted therewith, seeking reopening and reconsideration, and complainant's reply to the petition for leave to file; and it appearing that the matters submitted in said petition in support thereof do not present substantial and material reasons to warrant granting petitioners' request;

It is ordered, That the said petition for leave to file be, and it is hereby, denied.

By the Commission.

GEORGE W. LAIRD,
Secretary.

Defendant's Exhibit "B"

(Page 1 of 24 pages)

RECAPITULATION OF STATEMENT SHOWING CARLOAD SHIPMENTS OF AUTOMOBILE GEAR PARTS MADE BY THE NEW PROCESS GEAR COMPANY, FROM SYRACUSE, N. Y., TO DETROIT, MICH., DURING THE PERIOD FROM APRIL 1, 1944 TO AUGUST 21, 1947, ON WHICH REPARATION WAS NOT SOUGHT BECAUSE THE LEGALLY APPLICABLE COMMODITY RATE BASIS RESULTED IN LOWER CHARGES THAN THE SOUGHT CLASS RATE BASIS WOULD HAVE.

Year	*Number of Cars*	*Commodity Rate Basis Total Freight Charges*	*Classification Basis Total Freight Charges*	*Difference*
1944	260	$ 32,687.77	$ 36,892.37	$ 4,204.60
1945	369	44,576.76	49,802.46	5,225.70
1946	608	87,237.63	98,846.19	11,608.56
1947	480	83,305.39	95,628.90	12,323.51
Grand Totals	1717	$247,807.55	$281,169.92	$33,362.37

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. ~~912~~

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

v.

NEW PROCESS GEAR CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. EDGAR MCDONALD,
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New York 7, N. Y.,
Attorneys for Petitioner.

April 10, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

v.

NEW PROCESS GEAR CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The New York Central Railroad Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 8, 1957.

Citations to Opinions Below

The opinion and judgment of the United States District Court for the Southern District of New York is unreported and is printed in the record submitted to the Court below at pages 35a-37a.*

* The record submitted by petitioner to the Court of Appeals for the Second Circuit was printed in the form of an appendix. Petitioner will indicate references to that appendix as "R. -a." References to the appendices annexed to the instant petition will be indicated as "Appendix hereto, *infra*, p. ."

The opinion and judgment of the Circuit Court of Appeals is printed in Appendix B hereto, *infra*, pages 29-36, and is reported at 250 F. 2d 569. The memorandum and order of the Circuit Court of Appeals denying petitioner's petition for a rehearing is printed in Appendix D hereto, *infra*, pages 47-9, and is reported at 250 F. 2d 572.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 8, 1957. Appendix B, *infra*, page 35. Rehearing was denied on January 15, 1958. Appendix D, *infra*, page 49. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

(1) In a suit brought in a Federal District Court under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, may the defendant railroad be deprived of its right to fully contest the issues in a trial *de novo* before the court, limited only to the extent that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated?

(2) In a suit brought in a Federal District Court under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, may the court grant judgment if the report and order do not contain the basic findings required by Section 14(1) of the Interstate Commerce Act?

Statutes Involved

The statutory provisions involved are Sections 1(5), 8, and 16(2) of the Interstate Commerce Act [49 U.S.C. Sec-

tions 1(5), 8, and 16(2)], and Sections 5, 7 and 8 of the Administrative Procedure Act [5 U.S.C. Sections 1004, 1006 and 1007]. They are printed in Appendix A, *infra*, pages 23-8.

Statement

This litigation began with the filing of a complaint with the Interstate Commerce Commission by the New Process Gear Corporation against The New York Central Railroad Company on June 8, 1950, in which the rates and charges assessed on carload shipments of iron and steel automobile driving gear parts shipped over the defendant's lines from Syracuse, N. Y., to Detroit, Mich., during the period April 9, 1944, to August 21, 1947, were assailed as unjust and unreasonable, in violation of Sections 1 and 4 of the Interstate Commerce Act. The prayer of the complaint was for an award of damages only (R. 38a-9a). In a report* issued August 8, 1951, the Commission found that the assailed charges were unjust and unreasonable and that the complainant was entitled to reparation, with interest, on the basis of rates found reasonable by it (R. 63a-7a). Petitioner herein filed two petitions seeking the reopening and reconsideration of the report (R. 68a-82a, 84a); both were denied by the Commission (R. 83a, 85a). Thereafter an order was entered awarding reparation to respondent herein in the sum of $6,550.81, with interest at the rate of four per cent from August 2, 1954, on 638 shipments weighing approximately 26,000 pounds or less. Upon the refusal of the petitioner to comply with that order, a suit was instituted in the United States District Court, Southern District of New York, under Section 16(2) of the Interstate Commerce Act.

---

* Reported at 281 I.C.C. 701.

Petitioner's answer to respondent's complaint alleged that the report of the Commission was in error as to matters of law and fact; that the findings were not supported by competent evidence and were contrary to the weight of the evidence; that the order of the Commission based on the aforesaid report was invalid as to matters of law, and that the Commission acted arbitrarily in refusing to grant petitioner's petition seeking the reconsideration of the Commission's report and order (R. 7a).

At the trial respondent introduced in evidence certified copies of the report and order of the Interstate Commerce Commission, a statement showing the details of the shipments on which reparation was sought, and rested.

The defendant offered in evidence the pertinent portion of the record before the Interstate Commerce Commission (Ex. A). The defendant also introduced in evidence a statement covering 1,717 additional shipments made by the plaintiff over the defendant's line from Syracuse N. Y., to Detroit, Mich., during the period in which the complainant seeks reparation on only 638 of the total of 2,355 shipments. That statement, which was received in evidence (Ex. B), shows that the 1,717 shipments ranged in weight from 30,038 pounds to 68,830 pounds (R. 23a). A defense witness pointed out that the defendant would have received approximately $26,500 as additional freight charges had the basis on which the Commission awarded reparation on 638 shipments applied on all 2,355 shipments made by the plaintiff during the reparation period (R. 26a, 86a).

The defendant offered additional evidence to prove that the light-loading of each and every car on which reparation is sought resulted in the wasteful use of railroad equipment by this plaintiff during a period of war and national emergency in which the federal government had found it

necessary in the public interest to issue orders designed to regulate the use of railroad equipment in order to accomplish the maximum utilization thereof (R. 14a, 20a, 31a-33a). The defendant's witness testified that, with two exceptions, all 2,366 shipments were transported in cars of substantially the same type, size and capacity (R. 23a). He called attention to numerous instances where the plaintiff had used more cars than necessary to transport its shipments (R. 31a-33a). He pointed out, for example, that the plaintiff seeks reparation on three cars shipped on June 29, 1946, the average weight of which was 24,777 pounds, although on the very same date the plaintiff made five other shipments ranging in weight from 27,147 pounds to 63,830 pounds, with an average weight of 39,566 pounds. The average weight for all eight shipments was 34,020 pounds, or approximately one-half of the 63,830 pounds which was loaded in one of the eight cars. That weight could have been loaded in each and every one of the remaining 2,354 cars (R. 31a-2a).

This testimony was objected to by plaintiff on the ground that the Interstate Commerce Commission has sole jurisdiction to determine the reasonableness of rates, and that the only function of the court is to determine whether or not there was any substantial evidence to support the finding of the Commission (R. 12a, 13a, 14a, 20a, 21a, 22a, 25a, 26a, 33a-34a). The court ruled that it would receive all the evidence subject to the plaintiff's objection and a motion to strike to be made at the conclusion of the case (R. 19a). When plaintiff renewed its motion at the end of the entire case, the court reserved decision (R. 34a).

In the opinion of the trial court the motion to strike was granted upon the authority of *Glens Falls Portland C. Co. v. Delaware & Hudson Co.*, 66 F. (2d) 490, cert. denied 290 U. S. 697 (R. 35a). The court found that there was evidence before the Commission to sustain each of its findings,

including the finding of damage, and granted judgment in favor of the plaintiff (R. 35a).

On appeal, petitioner asked the Circuit Court of Appeals to overrule the *Glens Falls* case and to recognize the right given to defendant in a suit instituted under Section 16(2) of the Interstate Commerce Act, as construed by this Court in *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412. Petitioner also pointed out that in holding that each of the Commission's findings, including the finding of damage, is conclusive and binding upon the court and the parties if supported by evidence, the trial court went even beyond the holding of the *Glens Falls* case, which apparently would limit conclusiveness to the finding dealing with the reasonableness of the rate and not with the fact and amount of damage. The Court of Appeals refused to overrule the *Glens Falls* case, citing as authority for its decision the cases of *Mitchell Coal and Coke Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, and *United States* v. *I.C.C.*, 337 U. S. 426. Appendix B, *infra*, page 34.

Petitioner then petitioned the Court of Appeals for a rehearing on the grounds that it failed completely to understand the rate and tariff situation; that it misconstrued appellant's dissatisfaction with the Commission's decision; and that it overlooked the important fact that, while enforcement of the reparation order would result in affording the shipper with a dual or alternative basis of rates retroactively, the Commission's report contained no finding that respondent was entitled to alternative rates retroactively. Appendix C, *infra*, pages 36-46. The Court of Appeals denied this petition disclaiming any misunderstanding of the rate and tariff situation, and failing to give any significance to the absence of a Commission finding that a dual or alternative basis of rates would have been just and reasonable. Appendix D, *infra*, pages 47-9.

Reasons for Granting the Writ

Confusion and conflict exist in the law pertaining to the right of defendants to have a judicial trial and determination when sued upon reparation orders entered by the Interstate Commerce Commission under Section 16(2) of the Interstate Commerce Act [49 U.S.C. § 16(2)]. Although this court in 1915 construed Section 16(2) as meaning that a carrier has a right to a judicial trial and determination on all the issues, and upheld its constitutionality upon that ground, certain courts of appeals, including the Second Circuit, have disregarded this pronouncement, and have relied upon dictum appearing in an earlier decision of this court which, in effect, states that no such judicial trial and determination can be had.

The interpretation placed upon Section 16(2) by the courts below in the instant case makes Commission reports and orders conclusive rather than *prima facie* evidence of the facts therein stated. It is in conflict with the interpretation of that section by other courts of appeals, and again raises the issue of the constitutionality of that section.

The conflicting interpretations placed on Section 16(2) by the various courts of appeals create uncertainty and confusion as to the applicability of the provisions of the Administrative Procedure Act [5 U.S.C. 1001 *et seq.*] in connection with reparation proceedings.

Other important questions raised by this petition deal with the failure of the Commission to make the basic or quasi-jurisdictional findings, supported by evidence, essential to the validity of its orders, as required by Section 14(1) of the Interstate Commerce Act and the validity of a reparation order which fails to determine damages in the amount of the difference between the aggregate charges paid on all shipments moving within

the reparation period and the aggregate charges which would have accrued on all shipments on the basis found reasonable.

1. The Right of a Defendant to Fully Contest the Issues in a Trial *de novo* Before the Court.

(a) *The Rulings of the Courts Below.*

The Trial Court refused to recognize the right which Section 16(2) of the Interstate Commerce Act expressly reserves to a defendant when sued upon a Commission reparation order; namely, to a full contestation of all the issues, including the reasonableness of the rates and charges lawfully applicable on the shipments on which reparation is sought and the fact and amount of the alleged damages. As authority for such refusal, the Trial Court cited the case of *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co*, (C. A. 2, 1933), 66 F. (2d) 490, cert. denied, 290 U. S. 697 (R. 35a, 36a).

The Court of Appeals affirmed the Trial Court's action, citing as authority therefor the *Glens Falls* case, the case of *Mitchell Coal & Coke Co.* v. *Penn. R. R. Co.*, 230 U. S. 247, and the case of *United States* v. *I.C.C.*, 337 U. S. 426 (Appendix B, *infra*, p. 34).

(b) *The Applicable Law and the Conflict in Decisions.*

Section 16(2) of the Interstate Commerce Act provides that a suit instituted in a district court of the United States to enforce a reparation order of the Interstate Commerce Commission "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated". This provision has been construed in the case of *Meeker & Co.*

v. *Lehigh Valley R.R.*, 236 U. S. 412, as follows:

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law." (p. 430)

This construction of Section 16(2) was cited with complete approval in a number of subsequent decisions by this court including *Mills* v. *Lehigh Valley R.R.*, 238 U. S. 473, 482; *Pennsylvania R.R. Co.* v. *Jacoby & Co.*, 242 U. S. 89, 94; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 131; *Pennsylvania R.R. Co.* v. *Weber*, 257 U. S. 85, 90.

The court below disregarded this clear and forceful construction of the statute and placed reliance upon the three cases above noted.

The case of *United States* v. *I.C.C.*, 337 U. S. 426, obviously does not support the proposition that the "scope of review by the district court was whether there was substantial evidence supporting the findings of fact made by the Commission and whether the conclusions of the Commission were in accordance with the standards set by Congress" (Appendix B, *infra*, p. 34). On the contrary, the *Meeker* case was therein cited with complete approval and was relied upon by the court in concluding that shippers may seek judicial review of a Commission order denying reparation. It is stated at page 435:

> "But a Commission award favorable to a shipper is not final or binding upon the railroad. Such an award 'only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. * * * Nor does it in any

> wise work a denial of due process of law.' *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430. And see *Pennsylvania R. Co.* v. *Weber*, 257 U. S. 84, 90-91."

The case of *Mitchell Coal & Coke Co.* v. *Penn. R.R. Co.*, 230 U. S. 247, involved the question of whether, in advance of any application to the Interstate Commerce Commission and action thereon by that body, the Circuit Court of the United States had jurisdiction to entertain an action in trespass brought by a shipper of coal and coke to recover damages because of alleged unlawful preferential rates accorded to other and competing shippers. The court did not undertake to interpret Section 16(2), but it did state in what has been termed "elaborate dictum" that:

> "Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage —as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing (March 2, 1889, 25 Stat. 855, 859, c. 382)." (p. 258)

The *Glens Falls* case relies upon the dictum of the *Mitchell Coal* case and disregards the *Meeker* case.

The *Meeker* case was decided subsequent to the *Mitchell Coal* case, so that to the extent there may be a conflict the *Meeker* case must be deemed to have reversed the *Mitchell Coal* case. Nevertheless, the Court of Appeals in the instant case disregarded the *Meeker* case and relied upon the *Mitchell Coal* case. The conflict cannot be disputed.

Not only is there a conflict between the decision in the instant case and the decision in the *Meeker* case, but there are conflicting decisions among courts of appeals in the various circuits within the United States.

The following cases hold that the findings of the Commission are *prima facie* only and hence rebuttable, recognizing the right of a defendant to a judicial hearing *de novo*:

Atchison, T. & S. F. Ry. Co. v. *Spiller*, (C.A. 8, 1917), 246 F. 1, reversed on other grounds 253 U.S. 117. See also:

Southern Ry. Co. v. *Eichler* (C.A. 8, 1932), 56 F. (2d) 1010;

Blair v. *Cleveland, C., C. & St. L. Ry. Co.* (D.C., E.D. Ill. 1931), 45 F. (2d) 792; affirmed (C.A. 7, 1932), 59 F. (2d) 478;

Atlantic Coast Line R. Co. v. *Smith Brothers* (C.A. 5, 1933) 63 F. (2d) 747, Cert. denied 289 U.S. 761. See also: *Gabbert* v. *Atchison, T. & S. F. Ry. Co.*, (C.A. 5, 1937) 93 F. (2d) 562.

The following cases hold that the Commission's finding of unreasonableness is conclusive and binding if substantiated by evidence and do not permit the receipt of evidence excepting the record that was before the Commission:

Glens Falls Portland C. Co. v. *Delaware & Hudson Co.*, 66 F. (2d) 490, Cert. denied 290 U.S. 697;

South Carolina Asparagus G. Assn. v. *Southern Ry. Co.* (C.A. 4, 1933) 64 F. (2d) 419, Cert. denied 290 U.S. 647;

Delaware & H. R. Corporation v. *Penn Anthracite Mining Co.* (C.A. 3, 1937) 91 F. (2d) 634, affirming 16 F. Supp. 732; Cert. denied 302 U.S. 756;

El Paso & S. W. R. Co. v. *Phelps-Dodge Mercantile Co.* (C.A. 9, 1935), 75 F. (2d) 873.

In the 5th, 7th and 8th Circuits where the rule appears to be that a Commission finding of unreasonableness is not conclusive and that a judicial retrial and decision is proper, reliance is had upon the language of Section 16(2) as construed by this Court in the *Meeker* case.

In the 2nd, 3rd, 4th and 9th Circuits, where the rule appears to be that a Commission finding of unreasonableness is conclusive if there was evidence before the Commission to support that finding, reliance is placed upon the *Mitchell Coal* case or the *Glens Falls* case.

(c) *The Exemption of Reparation Proceedings From Statutory Provisions Preserving Procedural Rights.*

Where a complete judicial trial and decision is available in connection with an administrative order, there obviously is no need for a requirement that an administrative body be bound closely in respect of the character of the evidence it may receive or the manner in which its hearings may be conducted. Such was the view of this Court in the case of *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117, which involved a reparation order of the Interstate Commerce Commission. The Court there stated:

> "* * * And the fact that a reparation order has at most only the effect of *prima facie* evidence (*Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 430; *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 434, 439; *Mills* v. *Lehigh Valley R. R. Co.*, 238 U. S. 473, 482), being open to contradiction by the carrier when sued for recovery of the amount awarded, is an added reason for not binding down the Commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted." (p. 131)

Sections 5, 7 and 8 of the Administrative Procedure Act provide litigants before administrative bodies with

certain procedural safeguards. However, Section 5, which deals with adjudicatory proceedings expressly exempts "any matter subject to a subsequent trial of the law and the facts *de novo* in any court." *The Attorney General's Manual on the Administrative Procedure Act* explains this exemption as follows:

> "* * * This exemption was explained in the reports of the Senate and House Committees on the Judiciary, as follows: 'Where the adjudication is subject to a judicial trial *de novo* (it) is included because whatever judgment the agency makes is effective only in a *prima facie* sense at most and the party aggrieved is entitled to complete judicial retrial and decision.' Sen. Rep. p. 16; H. R. Rep. p. 26 (Sen. Doc. pp. 202, 260). Exempt under this heading are certain proceedings which lead to reparation orders awarding damages, such as are issued by the Interstate Commerce Commission (49 U.S.C. 16) and the Secretary of Agriculture (7 U.S.C. 210). Senate Hearings (1941) pp. 75, 1389, 1508. In the Senate Comparative Print of June 1945 (p. 8) (Sen. Doc. p. 22) the scope of the exemption was described as follows:
>
> > This exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement." (p. 43)

If an administrative proceeding is exempt from the provisions of Section 5, it would also be exempt from the provisions of Section 7, which applies "in hearings which Section 4 or 5 requires to be conducted pursuant to this section". A proceeding exempted from the provisions of Section 5 would also be exempt from the provisions of Section 8, which applies "in cases in which a hearing is required to be conducted in conformity with Section 7".

If the *Mitchell Coal* case and the *Glens Falls* case are controlling, and no judicial trial and decision is available in connection with the reparation orders of the Interstate Commerce Commission, confusion arises as to the rights of the parties relative to the manner in which a hearing is conducted before the Commission and relative to the character of the evidence the Commission may receive.

In the 5th, 7th and 8th Circuits, where the *Meeker* case controls and the carrier is entitled to a complete judicial retrial and decision, Sections 5, 7, and 8 of the Administrative Procedure Act could not and need not be invoked as forming the basis for a claim that the carrier did not receive a fair hearing before the Commission. On the other hand, in the 2nd, 3rd, 4th and 9th Circuits where the carrier is not permitted a complete judicial trial and decision, it would appear that Sections 5, 7, and 8 of the Administrative Act should be applicable where the carrier is making the claim that it did not receive a fair hearing before the Commission. However, since the exemption in Section 5 was intended by Congress to include reparation orders of the Interstate Commerce Commission because such orders are subject to a complete judicial trial and decision, considerable doubt arises as to whether that section and Sections 7 and 8 of the Administrative Procedure Act could properly be invoked.

The plain language of Section 16(2) and its forceful construction by the Court in the *Meeker* case constitute the justification for the exemption of reparation proceedings from the provisions of the Administrative Procedure Act, and the determination by this Court that it is unnecessary to apply the same procedural safeguards that are necessary where findings and orders are not subject to judicial retrial and decision. The unsoundness of the *Glens Falls* case and the dictum of the *Mitchell Coal* case is apparent.

(d) *The Mitchell Coal and Glens Falls Cases Would Render Section 16(2) Unconstitutional.*

The constitutionality of Section 16(2) was raised in the *Meeker* case. It was there held to be constitutional upon the grounds that this provision only establishes a rebuttable presumption and is at most merely a rule of evidence; that it does not abridge the right of trial by jury or take away any of its incidents; and that it cuts off no defense, permits a full contestation of all the issues, and takes no question of fact from either court or jury.

The dictum of the *Mitchell Coal* case and the doctrine of the *Glens Falls* case are in direct conflict with the reasons stated in the *Meeker* case for upholding the constitutionality of Section 16(2). These cases would make the reports and orders of the Interstate Commerce Commission not "*prima facie* evidence of the facts therein stated," but conclusive evidence, thereby effectually taking away the right of trial by jury and denying a defendant due process of law.

It follows that the action of the courts below in relying upon the *Mitchell Coal* and *Glen Falls* cases in the instant case results in abridging petitioner's right of trial by jury and the incidents of that right, and operates as a denial of due process.

2. The Report and Order does not Contain the Basic Findings Required by Section 14(1) of the Interstate Commerce Act and Therefore Judgment was Improperly Granted.

The complaint before the Interstate Commerce Commission alleged that the complainant made carload shipments of automobile gear driving parts, from Syracuse, N. Y., to Detroit, Mich., and that the rates and charges assessed thereon by the defendant were unjust and unreasonable, in violation of Sections 1 and/or 4 of the Interstate Commerce Act. The prayer of the complaint was that the Commission issue an order awarding damages "by way of

reparation for the unlawful charges collected on shipments during the period from April 9, 1944, to August 21, 1947" (R. 38a).

The Commission's hearing examiner recommended dismissal of the complaint, pointing out that the "complainant in asking for reparation, in effect seeks an alternating rate". He further pointed out that alternative bases of rates are generally undesirable and not in the public interest, citing the case of *Prentiss Wabers Products Co.* v. *Chicago & N. W. Ry Co.*, 219 I.C.C. 473 (R. 62a).

The Commission completely ignored that issue, and made the following finding:

> "We find that the charges assailed were unreasonable to the extent that they exceeded those which would have accrued at the corresponding class 40 rates subject to the minimum of 24,000 pounds. We further find that the complainant made the shipments, and paid and bore the charges thereon; that it was damaged thereby, and is entitled to reparation in the amount of the difference between the charges paid and those which would have accrued on the basis herein found reasonable, with interest." (R. 67a)

It made no finding that the failure of the defendant to publish and maintain a multiple basis of rates during the reparation period was unjust and unreasonable, and that its failure to do so resulted in the assessment of unjust and unreasonable rates and charges.

During the reparation period the complainant made a total of 2,355 carload shipments from Syracuse, N. Y. to Detroit, Mich., upon which the assailed rates and charges were lawfully applicable. The effect of the order of the Commission is to award reparation on 638 of those shipments. Had the basis of rates and charges which the Commission finds reasonable for reparation purposes been the lawfully published and legally applicable basis of rates and charges at the time all 2,355 shipments were

made, the complainant would have paid additional freight charges approximating $33,000 on 1,717 of those shipments, or net additional freight charges on the entire 2,355 shipments approximating $26,500.

The Trial Court and the Court of Appeals both recognized that the enforcement of the Commission's order would have the effect of providing respondent with a dual or alternative basis of rates retroactively, but gave no consideration to the important fact that the Commission's report contains no finding that the failure of petitioner to publish and maintain a multiple basis of rates and charges for application on this traffic during the reparation period was unjust and unreasonable, and that its failure to do so resulted in the application of unjust and unreasonable rates and charges (R. 37a; Appendix B, *infra*, p. 32).

Historically the Commission has frowned upon prescribing or approving alternative or dual bases of rates. As long ago as 1925, it stated that "It is not our policy or that of carriers to make alternative rates based on different minima." *Lafayette Box Board & Paper Co.* v. *A. C. & Y. Co.*, 101 I.C.C. 273, 274. In 1929 the Commission announced that the refusal to prescribe alternative bases in the *Lafayette* case "should be our guide for the future", inasmuch as such bases "are generally undesirable, in that they are liable to deprive carriers of reasonable carload revenue, result in unjust discrimination by affording different rates on the same commodity, entail wasteful use of equipment, and complicate the rate structure and the process of computing freight charges." *Mathieson Alkali Works* v. *Louisville & N. R. Co.*, 153 I.C.C. 784, 789.

This policy of refusing to prescribe or approve alternative rates, where the factors above mentioned exist, has been maintained by the Commission down through the years without change. *United Clay Products Corp.* v. *Abilene & S. Ry. Co.* (1930), 168 I.C.C. 23; *Traffic Bureau, Chamber of Commerce of Mitchell* v. *Atchison, T. & S. F.*

Ry. Co. (1931), 172 I.C.C. 295; *Eastern Fertilizer Cases* (1934), 198 I.C.C. 483, 495; *Southeastern Vegetable Case* (1934), 200 I.C.C. 273, 287; *Reconstruction Finance Corp.* v. *Akron, C. & Y. Co.* (1952), 287 I.C.C. 353, 359; *Tire Fabric between South and North* (1957), 299 I.C.C. 685, 688.

If the policy adopted by the Commission thirty or more years ago and maintained since without substantial change has any meaning or significance at all, it is obvious that the Commission could not in the instant case justify a finding that an alternative or dual basis of rates would have been just and reasonable and should have been maintained. Whether a departure from this prior and presently existing norm could have been satisfactorily explained away need not be inquired into in view of the failure of the Commission's report to state a finding relative to an alternative basis of rates.

In the absence of an express finding that the failure of petitioner to publish and maintain a multiple basis of rates and charges for application on this traffic during the reparation period was unjust and unreasonable, and that its failure to do so resulted in the application of unjust and unreasonable rates and charges, the rates and charges assailed either were just and reasonable as applied to all 2,355 shipments or they were unjust and unreasonable as applied to all 2,355 shipments.

This reasoning is entirely consistent with and inherent in the rule of damages under Section 8 of the Interstate Commerce Act for a violation of Section 1 (5) of said Act, as enunciated in the cases of *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, and *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217. Those cases hold that the measure of damages for the charging of an alleged unreasonable rate is the difference between the excessive rate and the rate declared to be just and reasonable by the Commission.

This reasoning was recognized by the Commission itself in *Bigelow-Hartford Carpet Co.* v. *New York, N. H. & H. R. Co.* (1929), 156 I.C.C. 435, 440, wherein it found the complainant damaged "in the amount of the difference between the aggregate charges paid or borne on *all* shipments moving within the statutory period and the aggregate charges which would have accrued upon *all* of said shipments at the bases herein found reasonable." (Emphasis supplied.) To the same effect is the case of *Roanoke Gas Light Co.* v. *Norfolk & W. Ry. Co.*, 191 I.C.C. 173, 176, wherein the Commission stated:

> "Under these circumstances we are of the opinion that the rates and minimum weight of 50,000 pounds herein prescribed should be applied to all the shipments which moved during the statutory period as mentioned herein, and that *the complainants' damage should be found to be the difference between the aggregate charges assessed upon all of said shipments (including those on which charges were assessed at the minimum of 36,000 pounds) and the aggregate charges that would have been assessed at the rates and minimum herein prescribed applied to all the shipments which moved during said statutory period.* This was the method applied in determining damages under similar circumstances in *Bigelow-Hartford Carpet Co.* v. *New York, N. H. & H. R. Co.*, 156 I.C.C. 435, 440." (Emphasis supplied.)

Since the decisions of the Commission in the *Bigelow-Hartford* and *Roanoke Gas* cases, the rule has been and continues to be that reparation will not be awarded where the rate found reasonable, in some instances would result in lower charges than those assessed, but in higher charges in others. The rule is stated in *Stimson* v. *Akron, C. & Y. Ry. Co.*, 262 I.C.C. 418, at page 423:

> "* * * While the findings will result in rates for the future which, in many instances, will be lower than

those now in effect, it is significant that there are many other rates which are lower than those found reasonable. *If we were to award reparation in this proceeding, limiting our findings only to those shipments which have moved at rates higher than those found reasonable for the future and ignoring other shipments which have moved at rates lower than maximum reasonable rates, an anomalous situation would be presented. The effect of this would be to require defendants to pay reparation on one class of shipments, while at the same time denying them the right to recoup the difference between the relatively low rates charged and those found reasonable on other shipments.* Our conclusions might well be otherwise if we were considering the complaints of numerous shippers, all interested in the same class of traffic. Here we have but one shipper. All things considered, we are inclined to the view that an award of the reparation would not be in accordance with substantial justice. Furthermore, in our judgment the rates charged on complainant's shipments, considering the entire adjustment, were not at such a level as would warrant such an award." (Emphasis supplied.)

To the same effect, *H. P. Randall Mfg. Co.* v. *Alton & S. R.*, 273 I.C.C. 745, 747; *Franklin Transformer Mfg. Co.* v. *Baltimore & O. R. Co.*, 278 I.C.C. 349, 354-5; *James B. Clow & Sons, Natl. Works* v. *Louisville & N. R. Co.*, 300 I.C.C. 27, 30.

It is apparent that an award of damages in the instant case would necessarily have to be based upon a finding that the petitioner should have published and maintained a multiple basis of rates and charges for application on this traffic during the reparation period, and that its failure to do so resulted in the application of unjust and unreasonable

rates and charges. No such finding appears in the Commission's report.

In the absence of such a finding, enforcement of the reparation order would result in a circumvention of Section 14 (1) of the Interstate Commerce Act. That section places upon the Commission a "duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order." *Alabama Great Southern R. R. Co.* v. *United States*, 340 U. S. 216, 228. Such a finding should be stated "with the simplicity and clearness through which a halting impression ripens into reasonable certitude." *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-11; *Secy. of Agriculture* v. *United States*, 347 U. S. 645, 654.

Enforcement of the reparation order in the absence of such a finding would also be contrary to the provisions of Section 8 of the Interstate Commerce Act. That section makes carriers liable "for the full amount of damages sustained" because of a violation of the provisions of that Act. Certainly, a shipper who paid approximately $26,500 less in aggregate freight charges on all of its shipments than it would have paid had the basis of rates and charges found reasonable been lawfully published and legally applicable throughout the reparation period cannot be said to have suffered any damage within the meaning of this section. As was stated in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 135, a claim for unreasonable freight charges is a claim not for a penalty, but for compensation.

Petitioner respectfully submits that it was error for the Court to grant judgment in the absence of a finding that it was unjust and unreasonable for petitioner to have failed to publish a multiple basis of rates and charges, and that its failure to do so resulted in the application of unjust and unreasonable rates and charges.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. EDGAR MCDONALD,
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466 Lexington Avenue,
New York 17, N. Y.,
Attorneys for Petitioner.

April 10, 1958.

Appendix A

Pertinent Provisions of the Interstate Commerce Act.

Sec. 1 (5) [49 U.S.C., § 1 (5)]:

All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 8 [49 U.S.C., § 8]:

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 16 (2) [49 U.S.C., § 16 (2)]:

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any

State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Pertinent Provisions of the Administrative Procedure Act.

Sec. 5 [5 U.S.C., § 1004]:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

* * * * * *

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and considera-

tion of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * * *

Sec. 7 [5 U.S.C., § 1006]:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Hearing Powers.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence,

(4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a

material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8 [5 U.S.C., § 1007]:

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision, or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 41—October Term, 1957.

(Argued October 9 and 10, 1957

Decided November 8, 1957.)

Docket No. 24532

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

—v.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and

LUMBARD and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, John W. Clancy, *Chief Judge.* Defendant appeals from a judgment entered in favor of plaintiff for $6,550.81 (amended to include interest, counsel fees and costs to $11,502.42) after a trial before the court without a jury. The action was brought to enforce an order of the Interstate Commerce Commission awarding reparations for unreasonable freight rate charges. Affirmed.

HARRY TEICHNER, *for plaintiff-appellee.*

GERALD E. DWYER (J. Edgar McDonald on the brief), *for defendant-appellant.*

Appendix B.

MOORE, *Circuit Judge:*

This is an appeal by the defendant, The New York Central Railroad Company (referred to as the "Railroad") from a final judgment of $11,502.42 in favor of the plaintiff, the New Process Gear Corporation (referred to as "New Process") in an action to enforce an order of the Interstate Commerce Commission (referred to as the "Commission") awarding reparation to New Process in the sum of $6,550.81 for alleged overpayments on freight shipments made by New Process over the Railroad's lines from Syracuse, N. Y., to Detroit, Mich., during the period April 9, 1944 to August 21, 1947 plus interest, counsel fees and costs.

On June 8, 1950 New Process filed a complaint with the Commission which assailed the freight rates charged on carload shipments of automobile driving gear parts as unjust and unreasonable in violation of Sections 1 and 4 of the Interstate Commerce Act (49 U. S. C. A. § 1(5) and § 4).

The proceeding was heard by a Commission examiner who recommended that the Commission "should find that the rates charged have not been shown to have been unreasonable" and that the complaint should be dismissed. Exceptions were filed by New Process to the examiner's report and the matter was thereafter heard by Division 3 of the Commission. This Division rejected the report of the examiner and found that the rates charged on certain of the shipments were unreasonable and that New Process was entitled to reparation "in the amount of the difference between the charges paid and those which would have accrued on the basis herein found reasonable, with interest."

Thereafter the Railroad filed a petition for reconsideration, pointing out the alleged errors of the report of Division 3, which petition was denied by order of the Commission, dated May 17, 1954. Subsequently the Rail-

road sought leave to file a further petition for reopening and reconsideration, which leave was also denied by the Commission on February 7, 1955.

To enforce the Commission's order awarding reparation, New Process brought this action in the district court for the Southern District of New York (49 U. S. C. A. § 16(2)).

The complaint that the freight rates charged were unreasonable is based upon the fact that during the period of the shipments in question there existed a Commodity rate between Syracuse, N. Y., and Detroit, Mich., for the gear parts shipped by New Process of 37¢ per 100 pounds for a minimum weight of 30,000 pounds and a Class rate of 42¢ per 100 pounds subject to a minimum weight of 24,000 pounds. Both Commodity and Class rates were subsequently increased but these increases only affect the mathematics of the reparation calculations and not the principle involved.

Taking the two rates in effect between April 9, 1944 and June 30, 1946 when the Commodity and Class rates were 37¢ and 42¢ respectively, the Railroad, using the Commodity rate, would have received $111 per car for a minimum weight of 30,000 pounds and 37¢ per 100 pounds for all weights above this minimum. Likewise, based upon a Class rate calculation of 42¢ per 100 pounds, the Railroad would have received $100.80 had 24,000 pounds been loaded at the 42¢ rate. A shipment of approximately 26,430 pounds at the 42¢ rate would have equaled the $111 amount at the 37¢ Commodity rate on the 30,000-pound minimum basis. Therefore, the only area in which New Process could have benefited by the application of the 42¢ Class rate would have been on shipments under 26,430 pounds. 2,355 shipments were made during the reparation period. 1,717 were over 30,000 pounds and, therefore, subject to the Commodity rate. The judgment

is based upon the difference between the amount payable on the other 638 shipments at the 42¢ Class rate (whenever the amount would have been less than 37¢ Commodity rate applied to the 30,000-pound minimum) and the amount actually charged based on the Commodity rate.

Division 3 of the Commission in its opinion justified its conclusion of unreasonableness by saying "A class rate based on the rating of a commodity in the governing classification is ordinarily the highest rate that may be deemed reasonable for that commodity. *E. I. DuPont de Nemours & Co.* v. *Chicago, N. S. & M. R. Co.*, 258 I. C. C. 789, 794. A carload minimum weight must be considered as a part of a carload rate, and where the minimum weight in connection with a commodity rate results in higher charges than under a class rate with a lower minimum, there is a presumption of unreasonableness requiring special justification. *Butte Fruit & Produce Co.* v. *Northern Pac. Ry. Co.*, 178 I. C. C. 370; *Butler Bros.* v. *Ann Arbor R. Co.*, 253 I. C. C. 437."

The Railroad had argued that it had agreed to the 37¢, 30,000-pound minimum rate to meet motor truck competition threatened by New Process. However, Division 3 dismissed this argument peremptorily by saying "Prior agreement, however, is not determinative of the just, reasonable, and non-discriminatory character of a rate. See *Ladd & Co.* v. *Gould Southwestern Ry. Co.*, 36 I. C. C. 179, 181."

The effect of the Commission's decision is to give the shipper, New Process, alternate rates despite the fact that in certain of its decisions it had said that the establishment of alternative bases was not generally desirable, although recognizing their reasonableness in special instances. The district court gave this effect to the Commission's decision, saying "What the Commission effectually did in this case was impose an alternate rate, some-

thing it had often protested it did not require as part of a fair rate basis. *American Popcorn Company* v. *Atchison, T. & S. F. Ry. Co.*, 182 I. C. C. 230; *Vacuum Cleaner Mfrs. Ass'n. v. Atchison, T. & S. F. Ry. Co.*, 276 I. C. C. 783, 792."

The Railroad concedes, as it must (49 U. S. C. A. §16(2)), that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, namely, that the rates charged were excessive and unlawful and that the Commission has primary jurisdiction over the question of reasonableness of rates. Its real dissatisfaction with the Commission's decision stems from the rejection of the Railroad's assertion that "The publication of a commodity rate automatically removes the application of a class rate, unless the tariff publishing the commodity rate specifically provides for its alternation with the class rate basis."

The fixing of rates and the determination of what rates are applicable are primarily functions of the Commission. Unless this Court is prepared to rule that the Commission has no power under any circumstances to recognize alternative rates in determining whether the rates charged are unreasonable, the conclusion of the Commission should be accepted (*Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 F. 2d 490, cert. den. 290 U. S. 697). The province of the appellate court was well defined in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663, as follows: "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province." Nor can this Court say as to the Commission's conclusion "that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute," *Barringer & Co.* v. *United States*, 319 U. S. 1, 6-7.

The Railroad cannot complain too seriously as a matter of equity. Two rates were published, one a Class rate and the other a Commodity rate. It accepted shipments at the lower Commodity rate for 30,000 pounds and up to avoid possible loss of its traffic to motor carriers. Its Class rate was available for shipments of 24,000 pounds and up. There was nothing in the record to indicate that New Process agreed not to ship any consignments of less than 30,000 pounds or not to take advantage of the published rate for the 24,000-pound minimum. Nor is the Railroad's argument helped by its mathematical speculations as to the savings to New Process had all the shipments been made at the Class rate because the shipper never agreed to use the Railroad's services at such a rate.

Upon appeal the Railroad, as appellant, asserts that there was no evidence before the Commission to sustain each of its findings and that it was entitled to a trial *de novo* before the district court. It also alleges error in the exclusion of evidence offered in the district court which had not been before the Commission.

The scope of review by the district court was whether there was substantial evidence supporting the findings of fact made by the Commission and whether the conclusions of the Commission were in accordance with the standards set by Congress (*United States* v. *I. C. C.*, 337 U. S. 426; *Mitchel Coal & Coke Co.* v. *Penn. R. R. Co.*, 230 U. S. 247; *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 F. 2d 490, cert. den. 290 U. S. 697).

There was substantial evidence before the Commission upon which its conclusion as to unreasonableness was solidly based. Nor was the action of the district court in striking the evidence offered by the Railroad prejudicial to it because damages on the Commission's theory could not have been computed on the over-all average theory advanced by the Railroad. The Commission specifically

limited the range of overcharge. Hypothetical Class rate charges on the 1,717 shipments could not have served as an offset to the reparation awarded.

The long-and-short haul provision of Section 4 and the reverse direction shipment presumption are not sufficiently material to be considered in any way determinative by the Commission or by the district court in reaching their conclusions. The possible inconsistency of the Commission in reaching different results in different cases is no basis for holding that the Commission must adopt one policy or the other.

The judgment below is affirmed with an attorney's fee in favor of the appellee in the sum of $1,000 as stipulated by the parties to be taxed as part of the costs upon this appeal in the event appellee prevailed.

Judgment

(Filed November 8, 1957.)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with the costs to the appellee.

Further ordered that an attorney's fee in favor of the appellee in the sum of $1,000. as stipulated by the parties be taxed as part of the costs upon the appeal.

Appendix C

United States Court of Appeals

FOR THE SECOND CIRCUIT

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

against

THE NEW YORK CENTRAL COMPANY,

Defendant-Appellant.

PETITION FOR REHEARING

To the Circuit Court of Appeals for the Second Circuit and the Judges thereof:

Comes now the defendant-appellant in this action and, in accordance with the provisions of Rule 25(a) of the Rules of the United States Court of Appeals for the Second Circuit, respectfully submits this petition for rehearing.

In support thereof the defendant-appellant respectfully shows:

I.

The Court has failed completely to understand the applicable rate and tariff situation.

During the period from April 9, 1944 to August 21, 1947, the plaintiff-appellee made 2,355 shipments of automobile gear frame parts from Syracuse, N. Y., to Detroit, Mich. During that entire period a commodity rate of 37

cents.* Subject to a carload minimum weight of 30,000 pounds, was the only rate legally applicable on those shipments, or on any other carload shipment made by any other shipper from Syracuse to Detroit, and regardless of whether it actually weighed 20,000 pounds or 80,000 pounds.

The decision of this Court indicates unmistakably that it failed to understand the rate and tariff situation which gave rise to the complaint before the Interstate Commerce Commission.

For example, the Court speaks (p. 37) of "two rates in effect between April 9, 1944 and June 30, 1946". Again, the Court states (p. 38) that 2,355 shipments were made during the reparation period, but that only "1,717 were over 30,000 pounds, and therefore subject to the commodity rate". And again the Court states (p. 40) that the defendant-appellant "accepted shipments at the lower commodity rate for 30,000 pounds and up, and that its class rate was available for shipments of 24,000 pounds and up".

That the Court further misunderstood or misconstrued the applicable rate and tariff situation as well as the position of the defendant-appellant, is further indicated by its statement (p. 39) that "its real dissatisfaction with the Commission's decision stems from the rejection of the railroad's assertion that 'the publication of a commodity rate automatically removes the application of a class rate, unless the tariff publishing the commodity rate specifically provides for its alternation with the class rate basis'."

Prior to October 21, 1941, the legally applicable rate was a class rate (55a). That class rate was superseded by the commodity rate which was published to become effective October 21, 1941.

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* That rate was increased to 41 cents per 100 pounds effective July 1, 1946, and to 47 cents per 100 pounds effective July 1, 1947.

Appendix C.

Section 141.7 of the Interstate Commerce Commission's Tariff Circular 20, issued June 11, 1928, as amended (49 CFR 141.7) provides as follows:

> "Where a commodity rate * * * is named in a tariff from origin to destination such commodity rate, except as otherwise provided in paragraphs (b) and (c) of this section and in Sec. 141.27, *is the applicable rate and the only rate that may be used* via the route or routes over which the commodity rate applies, even though a class rate (except as provided in Sec. 141.27), or some combination of rates may make lower." (Italics added.)

Paragraphs (b) and (c) of said section permit the publication of a provision for the "alternative use" of the commodity rate and the class rate. Section 141.27 permits the publication of a provision for the alternative application of class or commodity rates from or to intermediate points. As the Commission noted in its report, the tariff in question did not provide for the alternative application of the class and commodity rates (64a).

Thus, the only legally applicable rate on each and every one of the 2,355 shipments was the commodity rate.

II.

Because the Court failed to understand the applicable rate and tariff situation it erroneously concluded the Railroad cannot complain as a matter of equity.

At page 40 of its opinion the Court says:

> "The Railroad cannot complain too seriously as a matter of equity. There was nothing in the record to indicate that New Process agreed not to ship any consignments of less than 30,000 pounds or not to

take advantage of the published rate for the 24,000-pound minimum. Nor is the Railroad's argument helped by its mathematical speculations as to the savings to New Process had all the shipments been made at the Class rate because the shipper never agreed to use the Railroad's services at such a rate."

Section 6(7) of the Interstate Commerce Act made the collection of charges accruing under the commodity rate mandatory. So long as that tariff was effective it was to be treated as though it had been a statute, binding upon railroad and shipper alike. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197. The commodity rate was the only lawful rate and deviation from it was not permitted under any pretext. *Louisville & N. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97. No contract could reduce the amount legally applicable or release a shipper who had assumed an obligation to pay the charges, *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 264 U. S. 59, 65. Nor might equitable considerations serve to justify failure of the carrier to collect or retention by a shipper of any part of lawful tariff charges. *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478.

The only rate that the shipper "agreed" to pay or which the railroad "agreed" to assess on each and every one of the 2,355 shipments was, by virtue of Section 6(7) of the Act the legally applicable commodity rate.

The Court's conclusion (p. 40) that "the railroad cannot complain too seriously as a matter of equity" apparently results from its patent misunderstanding of the applicable rate and tariff situation, a fact indicated by its repeated assumption that one rate applied to shipments 30,000 pounds and up, and another for shipments 24,000 pounds and up. Actually one carload rate was legally applicable whether a shipment weighed 24,000 pounds, 30,000 pounds, or any other weight.

Appendix C.

The railroad was unalterably bound by the commodity rate for the period when it was in effect. On the other hand, although the shipper or consignee was bound to pay the lawful tariff charges it nevertheless was left with the right to apply to the Commission for reparation if it could factually and legally establish that the rates or charges paid were unreasonably high in violation of the provisions of the Interstate Commerce Act, and that it was damaged by reason of the alleged unlawful rate. *Penna. R. R. Co.* v. *International Coal Co., supra.*

In the instant case, the Commission held that the complainant should receive as reparation the sum of $6,550.81 on 638 shipments on the basis of a rate found by it to be a reasonable rate. Yet had that very same rate been the legally applicable rate throughout the reparation period, as the Commission in effect finds it should have been, the railroad would have received in excess of $33,000.00 as additional revenue on the remaining 1,717 shipments. If the rate was a just and reasonable one on 638 shipments, it was likewise a just and reasonable rate on the remaining 1,717 shipments. However, the railroad is left without a right at law to recoup the difference in charges that would have accrued—approximately $26,500. That an anomalous and inequitable situation results under these circumstances has, as a matter of fact, been recognized by the Commission itself, as the defendant-appellant pointed out in its reply brief at page 10.

The evidence herein shows that the commodity rate assailed by appellee before the Commission as being unreasonable was a rate which it requested the railroad to put into effect (54a). Incidentally, this evidence was not offered as being determinative of the reasonableness of the rate, as the Commission erroneously inferred in its report and to which this Court alludes at page 38 of the opinion. That evidence was offered only to show the Commission that at the request of New Process the rail-

road had substantially reduced the previously applicable 42 cent class rate by voluntarily publishing the 37 cent commodity rate in an effort to meet truck competition. But for that voluntary reduction by the railroad the class rate basis would have been legally applicable on each and every one of the 2,355 shipments, in which event New Process Gear would have been required to pay $26,500 in additional transportation charges. In other words, that commodity rate, published at the request of New Process Gear and then assailed by it as being unreasonably high, resulted in savings of approximately $26,500 in transportation charges during the reparation period alone.

Since this commodity rate was lower than the class rate which it superseded, the only instances in which lower charges could result under the superseded class rate were in connection with light-loaded shipments. The loading of the cars was within the control of appellee, and the evidence shows that it was entirely unnecessary to light-load the cars since the plaintiff was at the very same time loading other shipments as heavily as 70,000 or 80,000 pounds (56a, 57a, 58a, Exh. B). It shows that this light-loading took place during a period of war and national emergency when the Federal Government found it necessary in the public interest to issue orders designed to regulate the use of railroad equipment in order to accomplish the maximum utilization thereof (14a, 20a, 31a-33a), this evidence having been excluded by the trial court (34a).

Appellant respectfully submits that it would indeed be inequitable to award reparation to appellee on 638 shipments particularly where, as here, it was within appellee's own control to avoid the situation complained of, and where, as here, appellant is left without a right at law to recoup the sum of approximately $33,000 on the remaining 1,717 shipments.

Appendix C.

III.

The Court has misconstrued appellant's dissatisfaction with the Commission's decision.

At page 39 of the opinion it is stated:

> "* * * Its real dissatisfaction with the Commission's decision stems from the rejection of the Railroad's assertion that 'The publication of a commodity rate automatically removes the application of a class rate, unless the tariff publishing the commodity rate specifically provides for its alternation with the class rate basis'."

It is to be seen from what has been shown heretofore in this petition that the quoted portion of the above statement is a statement of fact which the Commission has not rejected and in fact could not reject since the commodity rate was the only rate legally applicable on the involved traffic from Syracuse to Detroit, having the force and effect of a statute. If that were not so, the sought class rate basis would have been legally applicable on the shipments on which reparation is sought, and there would have been no litigation.

The real dissatisfaction of the railroad with the Commission's decision stems from the fact that a rate which resulted in a saving to appellee in transportation charges of approximately $26,500 during the reparation period alone is nevertheless found unjust and unreasonable. It is the position of the appellant that the legally applicable commodity rate was either just and reasonable in its over-all application, or it was unjust and unreasonable in its over-all application. It is its position that in determining the fact and amount of damage, the Commission should have considered the assailed rate versus the sought rate in their application to all 2,355 shipments, and not simply to 638 shipments.

Appendix C.

IV.

The Court has overlooked the important fact that the Commission's report contained no finding that complainant was entitled to alternative rates retroactively.

It is stated in the opinion, at page 39:

> "* * * Unless this Court is prepared to rule that the Commission has no power under any circumstances to recognize alternative rates in determining whether the rates charged are unreasonable, the conclusion of the Commission should be accepted."

Defendant-appellant has not contended and does not contend that the Commission has no power under any circumstances to prescribe alternative rates. On the contrary, the appellant respectfully submits to the Court that had the Commission made a finding in its report that the complainant was or was not entitled to alternative rates, this matter would not be in litigation.

The nature of the evidence which would be necessary to support a finding of alternative rates is shown by the cases which appellant has cited in its reply brief at pages 13 and 14. Those cases make it clear that alternative rates will not be prescribed if they result in a loss of revenue or a wasteful use of equipment. In the instant case, had the complainant avoided the light-loading of the cars, as it could have done, the result would have been a more efficient use of the railroad's equipment and that action would have rendered academic any question concerning alternative rates inasmuch as in all instances the commodity rate would have resulted in lower charges.

The Examiner, in his proposed report, pointed out that the "complainant, in asking for reparation, in effect seeks an alternating rate" (62a). Yet, Division 3 completely ignored that statement of what the principal issue in the

case was and decided it on an entirely different basis. Appellant respectfully submits that the action of the Commission in disregarding the question of alternative rates, which the Examiner specifically dealt with in recommending dismissal of the complaint, must be deemed to constitute a declination on its part to afford complainant a dual basis of rates retroactively. At any rate, it would be highly improper for this Court to read into the Commission's report a conclusion which is not expressly stated, a conclusion, moreover, which the Commission itself deliberately ignored or rejected.

Section 14(1) of the Interstate Commerce Act provides as follows:

> "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; *and in case damages are awarded such report shall include the findings of fact on which the award is made.*" (Italics added)

The Commission's failure to conclude that complainant was entitled to a dual basis of rates retroactively, and its failure to make findings of fact to support such a conclusion renders its report and order invalid if the only basis on which reparation can be sustained is a right to dual rates. Obviously, that is the only basis since, in the absence of a dual basis, a single rate, either the commodity rate or the class rate, must be considered in relation to all 2,355 shipments in determining whether appellant was in fact damaged. A consideration of the class rate found reasonable in connection with said 2,355 shipments forces the conclusion that complainant actually benefited from the voluntary establishment of the commodity rate alleged to be unreasonable.

Appendix C.

It is stated at page 41 of the opinion:

> "There was substantial evidence before the Commission upon which its conclusion as to unreasonableness was solidly based. Nor was the action of the district court in striking the evidence offered by the Railroad prejudicial to it because damages on the Commission's theory could not have been computed on the over-all average theory advanced by the Railroad. The Commission specifically limited the range of overcharge. Hypothetical Class rate charges on the 1,717 shipments could not have served as an offset to the reparation awarded."

There is no justification for the second, third and fourth sentences in this paragraph except upon a theory that complainant was entitled to alternative rates retroactively. In fact, the opinion expressly states at page 38 that the effect of the Commission's decision is to give the complainant alternative rates. Appellant reiterates that the Commission was required to make an express finding to that effect based upon evidence of record. It did not and could not do so, and it would constitute error for this Court to assume that that was the theory upon which the case was decided.

A more serious question arises from that assumption. It is stated that there was "substantial evidence before the Commission upon which its conclusion as to unreasonableness was solidly based." Is the "conclusion" referred to the "assumed conclusion" that complainant was entitled to a dual basis of rates retroactively. If so, the Commission's report points to no evidence in that respect.

It is respectfully submitted that this Court has fallen into a serious error of giving effect to evidence to support an entirely different conclusion from that reached by the Commission. There was no evidence in this record to support a conclusion that the complainant was entitled to

alternative rates retroactively, but even if there were the Commission was required to make the necessary findings of fact in its report to support that conclusion. It has not done so, and it would be entirely improper for this Court to do it on its behalf.

V.

Conclusion.

For the reasons above stated, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court and the judgment of the United States District Court, Southern District of New York, be reversed.

Dated at New York, N. Y., November 21, 1957.

Respectfully submitted,

Gerald E. Dwyer,
J. Edgar McDonald,
Attorneys for Defendant-Appellant,
466 Lexington Avenue,
New York 17, N. Y.

The New York Central Railroad Company, appellant herein, by its attorney, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and in fact and proper to be filed herein.

Dated at New York, N. Y., November 21, 1957.

J. Edgar McDonald,
Attorney for Defendant-Appellant.

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 41—October Term, 1957.

(Petition filed November 22, 1957

Decided January 15, 1958.)

Docket No. 24532

NEW PROCESS GEAR CORPORATION,

Plaintiff-Appellee,

—v.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,*

LUMBARD and MOORE, *Circuit Judges.*

On Petition for Rehearing.

GERALD E. DWYER, Esq., New York, N. Y. (J. Edgar McDonald, Esq., New York, N. Y., on the brief), *for petitioner-defendant-appellant, The New York Central Railroad Company.*

MOORE, *Circuit Judge*:

Defendant-appellant has petitioned for rehearing because it believes that this Court in its opinion, filed on November

8, 1957, failed to understand the applicable rate and tariff situation and that this Court assumed that a commodity rate applied to shipments of 30,000 pounds and up and a class rate applied to shipments of lesser weights. The problem before this Court was whether the district court was correct in sustaining the Commission's findings and granting judgment for reparations. The Commission had found that "the charges assailed were unreasonable to the extent that they exceeded those which would have accrued at the corresponding class-40 rates subject to the minimum of 24,000 pounds." In its petitions for modification and further hearing before the Commission appellant raised the same points now urged, namely, that the rate on the 638 carload shipments "must, in the absence of a finding of a dual or multiple basis of reasonable rates, be found equally reasonable with respect to the 1,710 other carload shipments"; that there was only one rate legally applicable, the commodity rate; and that there was no provision for the alternative application of class and commodity rates.

In deciding whether the rates charged on the 638 carloads were unreasonable, the Commission applied as a measure for reparation the amounts which would have been payable if the class rate were in effect in contrast to the amounts payable on the commodity rate basis. This Court did not assume, as appellant states in its petition, that one rate (i.e., the commodity rate) applied to shipments of 30,000 pounds and up and another rate (i.e., the class rate) to 24,000 pounds and up. Nor did this Court decide that two rates, commodity and class, were available to New Process. The Commission, however, did find in fact that the rates were unreasonably high at to 638 carloads. As the district court pointed out, the Commission's "decision appears to be something of an innovation; it condemned a commodity rate only as it applies to low weight shipments and not its overall application." Its condemnation was merely incidental

to its finding of unreasonableness which rested upon a belief that the commodity rate when applied to low weight shipments resulted in an unreasonably high per pound figure. Since such a holding was within the power and discretion of the Commission, its decision as to rates should not be disturbed unless unsupported by evidence.

The petition for a rehearing is denied.

Order

(Filed January 15, 1958.)

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 912

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

—against—

NEW PROCESS GEAR CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 912

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

—against—

NEW PROCESS GEAR CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

(1) In a suit brought in a Federal District Court under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, is the defendant railroad entitled to a trial *de novo* by a court and jury on the administrative issue of reasonableness of rates?

(2) Do the report and order of the Interstate Commerce Commission upon which this suit is based contain the findings required by Section 14(1) of the Interstate Commerce Act?

ARGUMENT

The judgment of the Court of Appeals is correct and is not in conflict with any other decision, so as to warrant further review of the case by this Court.

1. The Defendant is not Entitled to a Trial de novo by a Court and Jury on the Administrative Issue of the Reasonableness of Rates

The petitioner seeks a pronouncement by this Court that in a suit under Section 16(2) of the Interstate Commerce Act to enforce a Commission order for the payment of money, the defendant railroad is entitled to have a jury determine what a reasonable freight rate would be for the transportation services in question.

It is apparent that such thesis would be abortive of the Interstate Commerce Act and would relegate us to the era preceding the legislative creation of that statute in the year 1887. In effect the petitioner is asking this Court to promote the very vice of non-uniformity of railroad rates and practices that was sought to be eliminated by the Congress of the United States. If this Court were to subscribe to the suggestion of the petitioner, different juries could reach different results in determining the reasonableness of a rate assessed by a carrier, thus introducing veritable chaos in the world of transportation. The problem was fully discussed by this Court in *Mitchell Coal and Coke Company* v. *Pennsylvania Railroad Company*, 230 U. S. 247, and the rationale therein fully supports the doctrine that the carrier is not entitled to a trial *de novo* before a trial court on the administrative issue of the reasonableness of transportation rates.

There is no conflict in decisional law on this subject. The cases cited in petitioner's brief at page 11, do not support the petitioner's contention. In *Atchison, T. & S. F. Ry. Co.* v. *Spiller*, 246 Fed. 1, reversed 253 U. S. 117, the only question decided by the court was whether the evidence before the

Interstate Commerce Commission supported its order of separation. The Circuit Court of Appeals held that there was not sufficient evidence to support the Commission's findings and that the trial court should have dismissed the complaint. This Court reversed and held that the evidence before the Commission was sufficient to sustain its findings and affirmed the judgment of the District Court.

Likewise, the case of *Southern Ry Co. v. Etchler*, 56 F. (2d) 1010, involved merely a review of the evidence adduced before the Commission to determine whether such evidence supported its order. In *Blair v. Cleveland, C., C. & St. L. Ry. Co.*, 45 F. (2d) 792, affirmed 59 F. (2d) 478, the controversy was focused upon judicial questions as to which the parties had a right to a trial *de novo*, but not upon the administrative issue of unreasonableness of the assailed rates. In *Atlantic Coast Line R. Co. v. Smith Brothers*, 63 F. (2d) 747, Cert. denied 289 U. S. 761, and *Gabbert v. Atchison, T. & S. F. Ry. Co.*, 93 F. (2d) 562, the question of a trial *de novo* on the administrative issue of unreasonableness of rates, was not presented.

On the other hand, the question was squarely presented in the case of *Glens Falls Portland Cement Co. v. Delaware & Hudson Co., et al.*, 66 F. (2d) 490, Cert. denied 290 U. S. 697. At the trial the defendants offered expert testimony as to the reasonableness of the rates in question. An objection to such evidence was sustained. In the Circuit Court of Appeals the Court stated at page 493, that the chief question on the appeal was whether the defendants are entitled to have the jury determine the reasonableness of the rates on evidence presented to it upon the trial regardless of the evidence presented to the Commission. The Court, relying upon this Court's decision in *Mitchell Coal and Coke Company v. Pennsylvania Railroad Company, supra*, answered that question in the negative and held that neither the shipper nor the carrier may attack the administrative decision on the issue of reasonableness of the rates except on the ground that there

was no evidence before the Commission to support it. The Court denied certiorari.

The question was also directly presented in *Delaware & H. R. Corporation* v. *Penn Anthracite Mining Co.*, 91 F. (2d) 634, affirming 16 F. Supp. 732, Cert. denied 302 U. S. In the trial court the defendants offered expert testimony to the reasonableness of the rates. This evidence was excluded. The question before the Circuit Court of Appeals was whether the court erred in refusing to allow the defendants to introduce evidence in contradiction of the Commission's finding that the rates assailed were unreasonable. The court followed the *Glens Falls*, *supra*, case and held that the question of reasonableness cannot be made the subject of a trial *de novo*, in the courts and that the Commission's findings thereon are binding on the courts if supported by evidence before the Commission. This Court denied certiorari.

In *El Paso & S. W. R. Co.* v. *Phelps-Dodge Mercantile Co.*, 75 F. (2d) 873, the Circuit Court of Appeals considered the evidence introduced by the carrier on the trial, only on the question of the fact and amount of damage, and stated that with respect to the issue of the reasonableness of the rates the findings of the Commission are conclusive. Similarly, in *South Carolina Asparagus G. Assn.* v. *Southern Ry. Co.*, 81 F. (2d) 419, Cert. denied 290 U. S. 647, the Circuit Court of Appeals held that the Commission's administrative finding fixing the extent to which the rates charged were unreasonable, is binding upon the courts. This Court denied certiorari.

In the case of *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, this Court said at pages 440 and 441:

> "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard

of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

In the case *of Baltimore & Ohio Railroad Company* v. [illegible] *Coal Co.*, 215 U. S. 481, this Court, commenting on the case just cited, stated at page 494:

"Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case, that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act to regulate commerce."

The rationale of the *Abilene* case, was recently repeated by this Court in *United States* v. *Western Pacific Railroad Company*, 282 U. S. 59, wherein it was held that the question of reasonableness of a tariff is within the exclusive primary jurisdiction of the Interstate Commerce Commission.

Following the decision rendered by this Court in *United States* v. *Western Pacific Railroad Co.*, *supra*, the United States Court of Appeals, Eighth Circuit, held in *Northwestern Auto Parts Company* v. *Chicago, Burlington & Quincy Railroad Company*, 240 F. (2d) 743, Certiorari denied, 353 U. S. 915, that questions of reasonableness of a tariff as applied are in the exclusive primary jurisdiction of the Interstate Commerce Commission.

In *Barringer & Co.* v. *U. S.*, 310 U. S. 1, 6-7, this Court applied the well settled rule that the conclusions of the Interstate Commerce Commission on administrative issues "will not be disturbed here unless we can say that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute (citing cases)." This case was cited in a footnote to the opinion in the case of *United States* v. *Interstate Commerce Commission*, 352 U. S. 158, 176, wherein this Court held that an administrative issue is a question of fact for the Commission's exclusive determination.

In *Great Northern Railway Company* v. *Merchants Elevator Company*, 259 U. S. 285, 291, this Court said:

> "To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

In *Dance Freight Lines* v. *United States*, 149 F. Supp. 367, the three judge District Court said at page 371:

> "The restricted function of the court in reviewing findings of the Interstate Commerce Commission, acting within the field of its designated power, has so frequently been emphasized by the decisions of the Supreme Court that it is no longer open to question."

In *General Motors Corporation v. United States*, 149 F. Supp. 838, the Court said at page 850:

> "Review by this Court of orders of the I.C.C. is limited to finding whether there was substantial evidence supporting any findings of fact made by the Commission and whether the conclusion of the Commission were in accordance with the standards set by Congress. United States v. I.C.C., 337 U. S. 426."

To like effect see *Ontario Freight Lines Corporation v. United States*, 76 F. Supp. 528, 529; *Seaboard Air Line R. Co. v. United States*, 131 F. Supp. 123, affirmed 349 U. S. 902; *Cleveland Electric Illuminating Co. v. United States*, 167 F. Supp. 622, 630; *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541; *Illinois Central R.R. Co. v. Interstate Commerce Commission*, 206 U. S. 441.

On page 6 of its petition, the petitioner states that the trial court extended the doctrine of the *Glens Falls, supra*, case to include the Commission's findings of the fact and amount of damage as being conclusive and binding upon the court. We believe the petitioner is in error inasmuch as there is nothing in the opinion and judgment of the trial court to warrant the petitioner's statement.

We respectfully submit that the court below correctly decided that the trial court properly limited its consideration of the reasonableness of the assailed rates to a determination as to whether there was evidence before the Commission to sustain its findings on that issue.

settled principle of law that the Commission is not bound by the doctrine of *stare decisis* and that it may consider each case before it upon the evidence adduced therein, and so long as its decision in a particular case is supported by the evidence, it matters not that a contrary conclusion was reached by it in another similar case. The Courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. E.g., *Georgia Public Service Commission v. United States*, 283 U. S. 765, 775; *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663; *Western Paper Makers Chemical Co. v. United States*, 271 U. S. 268, 271.

This Court said in *Virginian Ry. Co. v. United States*, *supra*, at page 663:

> "To consider the weight of evidence before the Commission, the soundness of its reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED, AND AN ADDITIONAL COUNSEL FEE SHOULD BE ALLOWED TO THE RESPONDENT FOR SERVICES COVERING THIS PROCEEDING IN PURSUANCE OF SECTION 16(2) OF THE INTERSTATE COMMERCE ACT.

Respectfully submitted,

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April 21, 1958.